

JAN 24 1990

H. F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1989

ROBERT COHEN, individually and as a Partner of  
SIMON COHEN REAL ESTATE & MANAGEMENT  
CO., SIMON COHEN REALTY CO., SIMON COHEN  
COMPANY and ALJER REALTY CO. suing on behalf of  
himself and all other partners, both general and limited,  
and in the right and on behalf of SIMON COHEN  
REAL ESTATE & MANAGEMENT CO., SIMON COHEN  
REALTY CO., SIMON COHEN COMPANY and ALJER  
REALTY CO., —

*Petitioner,*

*against*

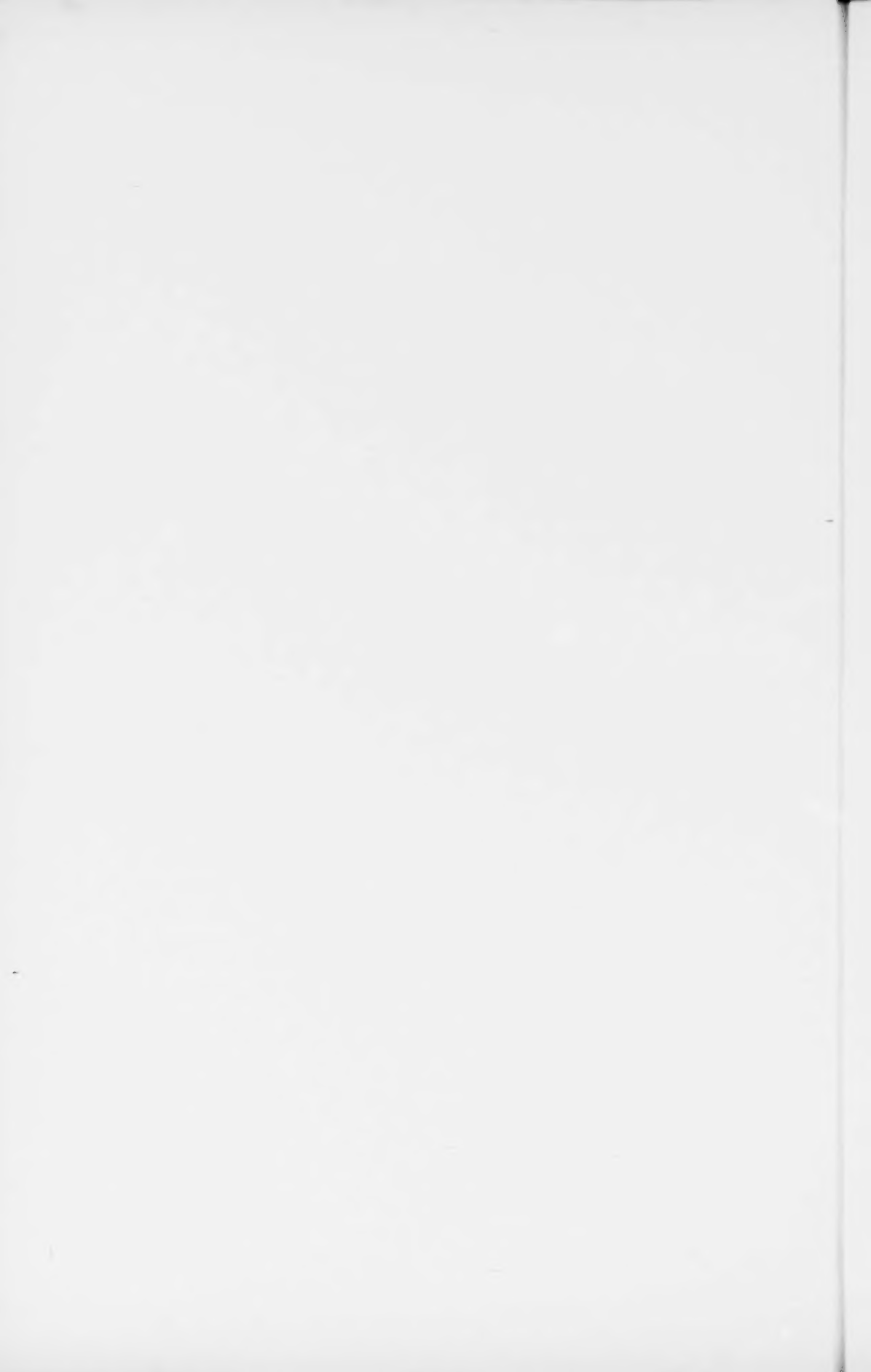
ROBERT J. REED, SIDNEY HACKELL, BEATRICE  
POTTER and the FIRST NATIONAL CITY BANK, in-  
dividually and as Executors of the Last Will and Testa-  
ment of SIMON COHEN, deceased, WILLIAM B.F.  
WERNER, individually and doing business as MID-IS-  
LAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK,  
J.S.K. CLEANING SERVICES, INC., JUDAH FEIN-  
ERMAN, JASDANE, INC., SHELDON KATZ, VOLUME  
FEEDING, INC., DADGAB, INC., BRIMSCO, INC.,  
SIMON COHEN REAL ESTATE & MANAGEMENT  
CO., SIMON COHEN REALTY CO. and ALJER  
REALTY CO.,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE  
OF NEW YORK, APPELLATE DIVISION,  
SECOND JUDICIAL DEPARTMENT**

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16 p. 2





**Question Presented**

Is the due process clause of the Fourteenth Amendment violated when, in a derivative action, a state court intervenes in a trial to impose a settlement proposed by the defendants, where neither the sole representative plaintiff nor his attorney nor the derivative entity has consented to such settlement?



### III

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## **Introduction**

Petitioner Robert Cohen, individually and as a partner of Simon Cohen Real Estate & Management Co. ("SCREAM"), Simon Cohen Realty Co. ("SCR"), Simon Cohen Company ("SCC") and Aljer Realty Co. ("Aljer"), respectfully prays that a writ of certiorari issue to the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York to review its judgment and opinion entered in this proceeding on May 5, 1986.

## **Opinions Below**

The opinion of the Appellate Division is reported at 120 A.D.2d 480, 501 N.Y.S.2d 685 (2d Dept. 1986) (mem.) and is reproduced at A-i. The Appellate Division's order affirmed a settlement decree of the Surrogate's Court of the State of New York, in respect of which an opinion was rendered by Radigan, Surr., on April 27, 1984. The Surrogate's opinion is unreported and is reproduced at A286.

References are to pages of the Appendix annexed to the petition.

## **Jurisdiction**

The judgment of the Appellate Division, affirming a settlement decree of the Surrogate Court, was entered on May 5, 1986. Timely petitions to the Court of Appeals of the State of New York for leave to appeal to that Court were filed by the petitioner herein. Three of such petitions were dismissed for lack of jurisdiction in that, under the Constitution of the State of New York, the judgment appealed from was not a final order and therefore not appealable to the Court of Appeals. These dismissals were rendered without opinion and are reported at 68 N.Y.2d 807, 506 N.Y.S.2d 1037 (Sept. 16, 1986); 69 N.Y.2d 1038, 517 N.Y.S.2d 1031 (June 4, 1987); and 70 N.Y.2d 899, 524 N.Y.S.2d 427

(Dec. 17, 1987); and are reproduced at A401, A403 and A408. On May 9 and 10, 1988, the Surrogate's Court entered a supplemental decree (A455) and an order (A458) which resolved the remaining issues under its earlier decree and apparently satisfied the New York constitutional requirement of finality. Petitioner then moved again for leave to appeal to the Court of Appeals and that motion was denied by the Court of Appeals on October 26, 1989, without opinion. Such denial is not yet officially reported and is reproduced at A463. This Court's certiorari jurisdiction is invoked under 28 U.S.C. § 1257.

### **Constitutional Provisions**

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

...nor shall any State deprive any person of life, liberty, or property, without due process of law;...

### **Statutory Provisions**

Section 115-a of the Partnership Law of New York provides, in relevant part:

1. An action may be brought in the right of a limited partnership to procure a judgment in its favor, by a limited partner, additional limited partner, or a substituted limited partner.

\* \* \*

4. Such action shall not be discontinued, compromised or settled, without the approval of the court having jurisdiction of the action. If the court shall determine that the interests of the limited partners, additional limited partners or substituted limited partners, will be substantially affected by such discontinuance, compromise or settlement, the court, in its discretion, may direct that notice, by

publication or otherwise, shall be given to the limited, additional or substituted limited partners whose interests it determines will be so affected; if notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as special costs of the action and recoverable in the same manner as statutory taxable costs.

### **Statement of the Case**

Petitioner Robert Cohen sued individually and on behalf of four partnerships, SCREAM, SCR, SCC and Aljer, in Surrogate's Court, Nassau County, New York for an accounting, reformation of a lease and other relief. The complaint was based, in part, on the misappropriation of income from the four partnerships by the deceased managing general partner, Simon Cohen, acting in conjunction with the various individual and corporate defendants. The misappropriation also took the form of interest-free loans to the general partner as well as various schemes for siphoning income by assigning the right to perform various services used by the partnerships to certain of the defendants.

The two principal partnerships, SCR and its successor SCREAM, leased premises in Bethpage, New York to Dr. William Werner, starting in 1960. Under the lease arrangements, Dr. Werner operated a medical facility known as Mid-Island Hospital as a sole proprietorship at that site and agreed to pay the net profits of the Hospital to these partnerships as rent.

The Hospital was actually operated not by Dr. Werner, but by Simon Cohen, as the Hospital's managing director. Because Simon Cohen was also the general partner SCR and then of SCREAM, he should have vigilantly protected

the interests of those partnerships for whom he was a fiduciary. Instead, with the active assistance of many of the defendants, he improperly diverted hospital income for his own purposes and those of other defendants, thereby sharply reducing the rent paid to the partnerships. For example, in 1963, Simon Cohen caused the hospital to grant a concession for its gift shop, snack bar, vending machine and television rental services to his own cronies and caused the hospital to overpay for the services, to the prejudice of the rental income paid to the partnerships.

Also in 1963, Simon Cohen caused the hospital to "sell" to another Simon Cohen crony a cobalt machine that the hospital purchased a few months earlier, and thereafter to contract with the owner of the machine for its use. Profits from use of the machine were thereby diverted from the hospital and in turn from SCREAM; instead they wound up with another of Simon Cohen's close friends.

In 1964 the hospital's food services were spun off to respondent's Volume Feeding Inc., an entity owned and operated by cronies of Simon Cohen, which then overcharged the hospital for its purported food services.

Similarly, in 1967 the hospital entered into an agreement with J.S.K. Cleaning Services, Inc., a newly-formed corporation, whereby J.S.K., using the hospital's own former cleaning employees, was to provide maintenance services. J.S.K.'s profits on the maintenance contracts were then siphoned off to benefit Simon Cohen by having J.S.K. perform maintenance contracts for other entities owned by Simon Cohen.

In addition to using these siphoning devices, Simon Cohen also diverted income during the period 1965 through 1970 by borrowing millions of dollars, in approximately 200 separate transactions, from SCREAM, SCR, SCC and the Hospital. No interest was ever paid by Simon Cohen for use of these funds and no accounting was ever rendered by him. Many of these borrowings were paid at year-end, and the funds reborrowed at the start of the



succeeding year, in order to avoid disclosure of the loans on year end balance sheets of the partnerships and the hospital.

Robert Cohen's amended supplemental complaint asserted 17 causes of action. The first sixteen causes of action were asserted on behalf of the partnerships<sup>1</sup> and alleged that Simon Cohen borrowed funds from the partnerships without paying interest, disclosing the facts or obtaining the consent of his partners. They alleged that Simon Cohen had created various satellite companies, which he placed in the hands of trusted nominees, and manipulated their dealings for his purposes to the prejudice of his partners. They also alleged that the executors of the Estate of Simon Cohen attempted to cover up this misconduct by issuing false financial statements, testifying falsely and concealing the facts.

The action was commenced in Supreme Court, Nassau County, on August 13, 1971 and thereafter transferred to Surrogate's Court, Nassau County, on November 24, 1971. After a lengthy period of discovery, the trial commenced in Surrogate's Court on March 4, 1980 and extended for 55 trial days until October 22, 1981.

At that point, before petitioner had rested, the Surrogate intervened to force a settlement. The Surrogate refused to set any further trial dates and pressed the parties to agree to settle the case.

While the case was in limbo—with the trial stalled by the Court—a dispute then arose between petitioner and his then counsel of record, Stephen Hochhauser. Petitioner then moved in March 1983 for an order substituting new counsel and Hochhauser countered with a cross-motion seeking removal of Robert Cohen as a representative plaintiff on the ground that Cohen had allegedly had a conflict of interest. To resolve the substitution application and Hochhauser's claim, the Surrogate held four days of evidentiary hearings in the Fall of 1982, at which both

<sup>1</sup>A seventeenth cause of action, asserting Robert Cohen's claim to be a general partner of SCREAM, was withdrawn with prejudice in 1985.

Robert Cohen and Hochhauser testified extensively. The result was a decision by the Surrogate dated January 18, 1983 in which he determined that the substitution should be made and that Hochhauser's charges of conflict of interest should be dismissed.

However, before these issues were decided and while Hochhauser's unfounded charges were still pending, the Surrogate requested on December 17, 1982 that the defendants present a settlement proposal. The defendants then delivered such a proposal to the Surrogate, *ex parte*, and on January 24, 1983 the Surrogate distributed notice of this proposal to the limited partners of the various limited partnerships. Only when he received this notice did Robert Cohen learn of the terms of the defendants' settlement proposal.

Responses from the limited partners to the Surrogate's notice came only from holders of a small minority of the partnership interests. Like defendants' proposal, these responses were received by the Surrogate *ex parte*; they were not disclosed to Robert Cohen until May 1983, after he learned of them and objected to their secret nature. The Surrogate then directed that a hearing be held on May 24, 1983 at which Robert Cohen and those who had objected show cause why the proposed settlement should not be approved.

At the May 24, 1983 hearing, the defendants presented no evidence in support of their proposal. Nevertheless, instead of dismissing the proposed settlement, the Surrogate on June 22, 1983 requested certain modifications to the proposal, indicating that these had been suggested by some of the limited partners' earlier written responses. The defendants then responded by indicating their acceptance of these certain modifications. Thereafter on January 6, 1984, the Surrogate proposed further modifications and gave the defendants time within which to consider and accept or reject them. Again the defendants accepted. The now twice modified settlement proposal was then approved by the Surrogate in a decision dated April 27,

1984 and was formalized in an order entered November 27, 1984. As approved, the settlement, although twice modified, was still similar to the defendants' December 1982 proposal.

In essence, the settlement decree provided that all of Robert Cohen's 16 derivative causes of action were dismissed, claims for an accounting or other relief were foreclosed, the defendants were to pay the partnerships approximately \$500,000 (an amount that was less than Cohen's actual litigation expenses) and the partners were granted some limited inspection rights for the future.

Throughout the period from December 1982, when the Surrogate requested the settlement proposal for the defendants, to November 1984, when he approved the proposal, Robert Cohen vigorously objected to the Court's procedure and to the proposal itself.

The claim of violation of due process was raised before the Surrogate in a motion for a new trial made on January 31, 1984 at pp. 9, 10 and 19 of the supporting affidavit and p. 5 of the supporting memorandum. For example, in the supporting affidavit, at p. 19, petitioner said:

"Because my rights to a speedy disposition of the case have been and continue to be violated, because there is scant of the trial before Judge Radigan being completed expeditiously, because the delay has prejudiced my rights to a fair trial and because I have been denied due process, the Court should order a new trial."

The due process claim was also raised in petitioner's brief on appeal to the Appellate Division, *inter alia* at p. 38-41:

"In every case known to counsel in which a class action or derivative action settlement has been approved, an actual settlement agreement was agreed to by either a representative plaintiff or a representative plaintiff's attorney. Counsel

have found no class action or derivative case, nor have any been cited by the Surrogate, in which a settlement was imposed without such an actual agreement.

\* \* \*

In approving the settlement proposal over Robert Cohen's objection and without an agreement among counsel, the Surrogate disregarded the principle that one side's settlement proposal may not be imposed on the other side without its consent."

The issue was also raised in petitioner's fourth motion for leave to appeal to the Court of Appeals at pp. 11 and 12 of the supporting affidavit.

### **Certiorari Should be Granted**

Certiorari should be granted because the order of the Appellate Division violates the due process rights of petitioner. It establishes a completely new—and improper—procedure for the settlement of derivative actions, in violation of the fundamental rule that a settlement requires the consent of the parties on *both* sides. The Appellate Division's order is completely without precedent. We believe it is the first reported appellate decision anywhere, whether in New York, other states or the federal system, in which a settlement is imposed in a derivative case even though neither the sole representative plaintiff nor his counsel (nor the entity on whose behalf suit is brought) has agreed to the settlement.

Due process expresses the requirement of "fundamental fairness" and is not a mere technical conception. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 24 (1981); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961).

The constitutional guarantee of due process recognizes that minimum procedural requirements are a matter of

federal law and are not diminished by the fact that the state may have its own procedures that it may deem adequate for determining the preconditions to adverse official action. *Logan v. Zimmermann Brush Co.*, 455 U.S. 404, 432 (1982). As a matter of federal constitutional law, the state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. *Id.* at 434. While the nature of the required hearing will depend on the appropriate accommodation of the competing interests involved, *id.*, where the state acts only as the adjudicator of a genuine and well-founded dispute between private parties, its interest in terminating a private litigant's right to a trial is minimal. And where the trial is already in progress, the state has no valid interest in terminating the trial by imposing an involuntary "settlement" simply because the proceedings prove to be lengthy or the issues are discovered to be complex.

The procedure followed by the Surrogate in this case violates petitioner's due process rights because he, not the trial court, has the right to conduct the litigation on behalf of the partnerships and to negotiate settlements. Under the Appellate Division decision, the trial judge was permitted to substitute his view for the view of both the representative plaintiff and his counsel, even where, after an extensive hearing, the court has rejected allegations that the representative plaintiff was acting improperly.

The Appellate Division decision erroneously relies upon the court-solicited "consent" of some of the limited partners, none of whom is a party or representative plaintiff, or otherwise appeared in the proceeding. These limited partners, as non-parties, have no fiduciary responsibility for the course of the litigation and have no power to reach a binding settlement agreement. State courts cannot circumvent the rights of a party to conduct litigation by the device of soliciting such "consents" from non-parties whose interests are indirect and whose knowledge is highly limited. Although in class actions lower courts have



held that approval by class members is a relevant, albeit a minor, factor in evaluating a settlement, prior to the decision below no court had ever held such approval to be sufficient to create a settlement agreement in a derivative action where neither the representative plaintiff nor his counsel nor the entity they represent had agreed to the defendants' proposal.

The Appellate Division attempted to support its decision by referring to allegations of Robert Cohen's supposed conflict of interest. But the Surrogate had already ruled that those charges were not substantiated and should be dismissed. (A205).

Due process does not permit a trial court to impose on petitioner, as the sole representative, a settlement that neither he nor his attorney nor the plaintiff he represents has agreed to. Unless there is an actual settlement agreement negotiated between the parties (and not simply a proposal by the defendants which is "consented to" by some non-party beneficiaries), the procedure approved by the Appellate Division deprives this petitioner, and threatens to deprive all similarly situated representative plaintiffs, of the right to a fair hearing.

The Appellate Division's unconstitutional determination has broad implications both for the state and federal court systems. It effectively means that the trial courts are empowered in derivative actions to disregard the wishes of the parties and their lawyers on one side of the table and to impose settlements proposed by the other side. To be sure, the Surrogate did solicit the views of non-parties who had interests in the partnerships. But they were not parties, had no fiduciary obligations, and were not in any position to evaluate the case properly.

Unlike a class action, where settlements have been imposed over the wishes of class members, those class members have the right, mandated by the due process clause, to opt out of the settlement. Here, Robert Cohen, the only plaintiff on behalf of the partnerships, had no right to opt out, but was forced by the Surrogate and the

Appellate Division to abide by a settlement to which he and his lawyer vigorously objected.

This case is unlike a few lower court cases where the views of one or more nominal representative plaintiffs were overridden because they were not the real parties in interest. In this case, the real party in interest is Robert Cohen. Not only did he serve as the sole representative plaintiff, but he also paid well in excess of \$600,000 in legal fees in support of the litigation and he actively participated in reviewing all papers, preparing for all hearings and deciding upon the relevant legal strategies. In no sense was he a nominal plaintiff and therefore when his rights to a trial were abrogated without his assent or the assent of his lawyer, he suffered a direct injury to his constitutional rights as a litigant.

Review is needed to prevent a miscarriage of justice. Overwhelming evidence of waste and fraud by the defendants was established during the trial. Vast sums were taken from the partnership by Simon Cohen as interest-free loans. Other vast sums were siphoned out of the partnerships' income stream through the use of service companies created for Simon Cohen's cronies. Yet without the consent of the sole representative plaintiff or his counsel, a settlement was imposed in which the recovery by the partnerships will be less than the actual legal fees paid by the representative plaintiff and where the clearly established malfeasance of the defendants is excused without any accounting.

The Supreme Court of the United States has never directly addressed the question of the power of a court in a derivative action to impose a settlement in the absence of an agreement among the litigants. Because the Appellate Division's decision is a significant precedent with nationwide implications and because it resulted in a denial of due process and a miscarriage of justice, this Court should grant certiorari to consider the question presented.

### **Conclusion**

For the foregoing reasons, petitioner respectfully prays that his petition for a writ of certiorari be granted.

Dated: January 22, 1990

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*Respondents.*


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**APPENDIX TO**  
**PETITION FOR A WRIT OF CERTIORARI**  
**VOLUME I OF TWO VOLUMES**  
**(Pages A-i to A-xiv—A1 to A233)**

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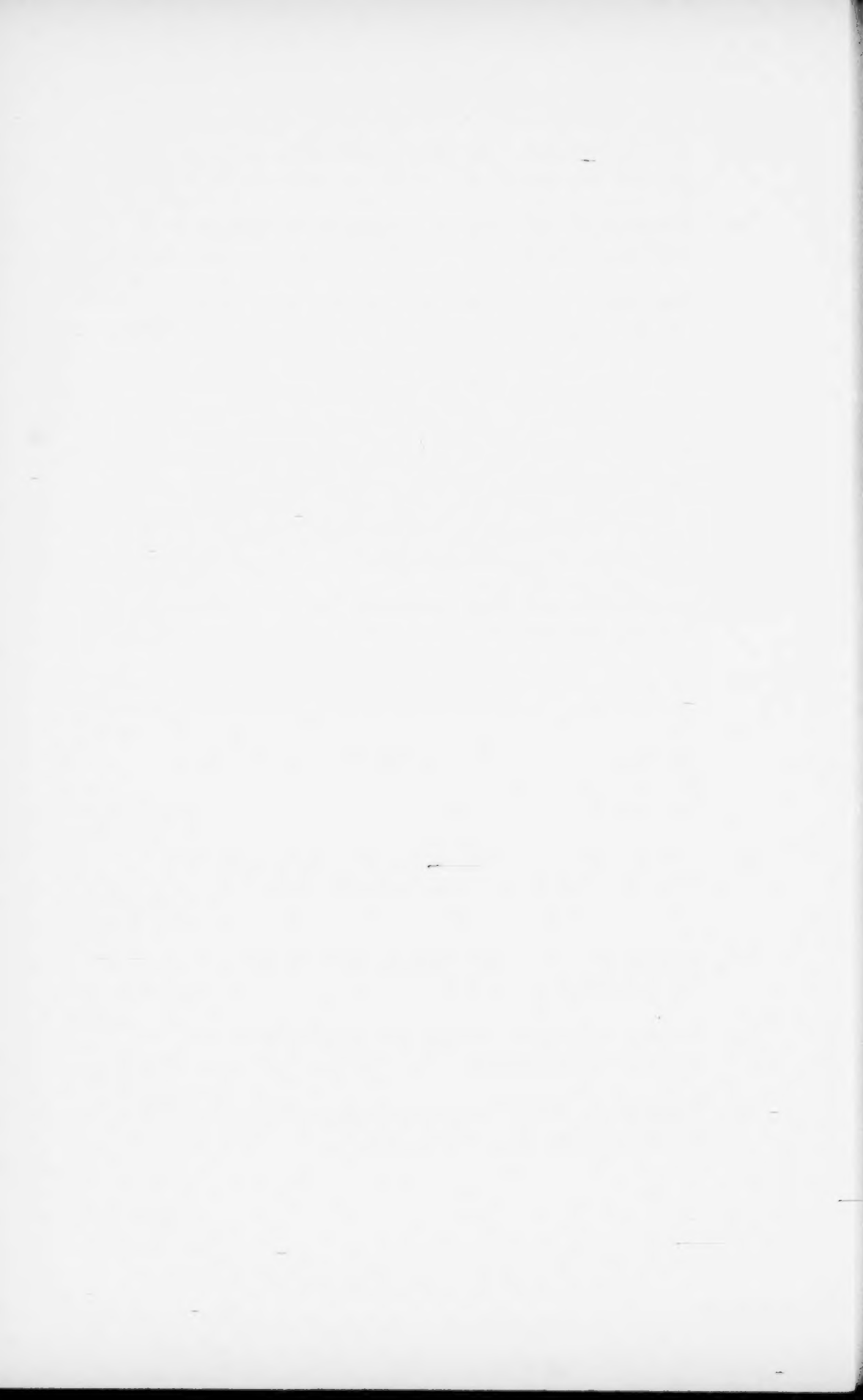
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APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : AD2d  
Estate Co., et al.,  
: 3666 E  
Plaintiffs- : 3666 AE  
Appellants, : A-3/24/86  
- against - :

ROBERT J. REED, et al.,:

Defendants- :  
Respondents.

-----X

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Services, Inc., Sheldon Katz and Volume  
Feeding, Inc.

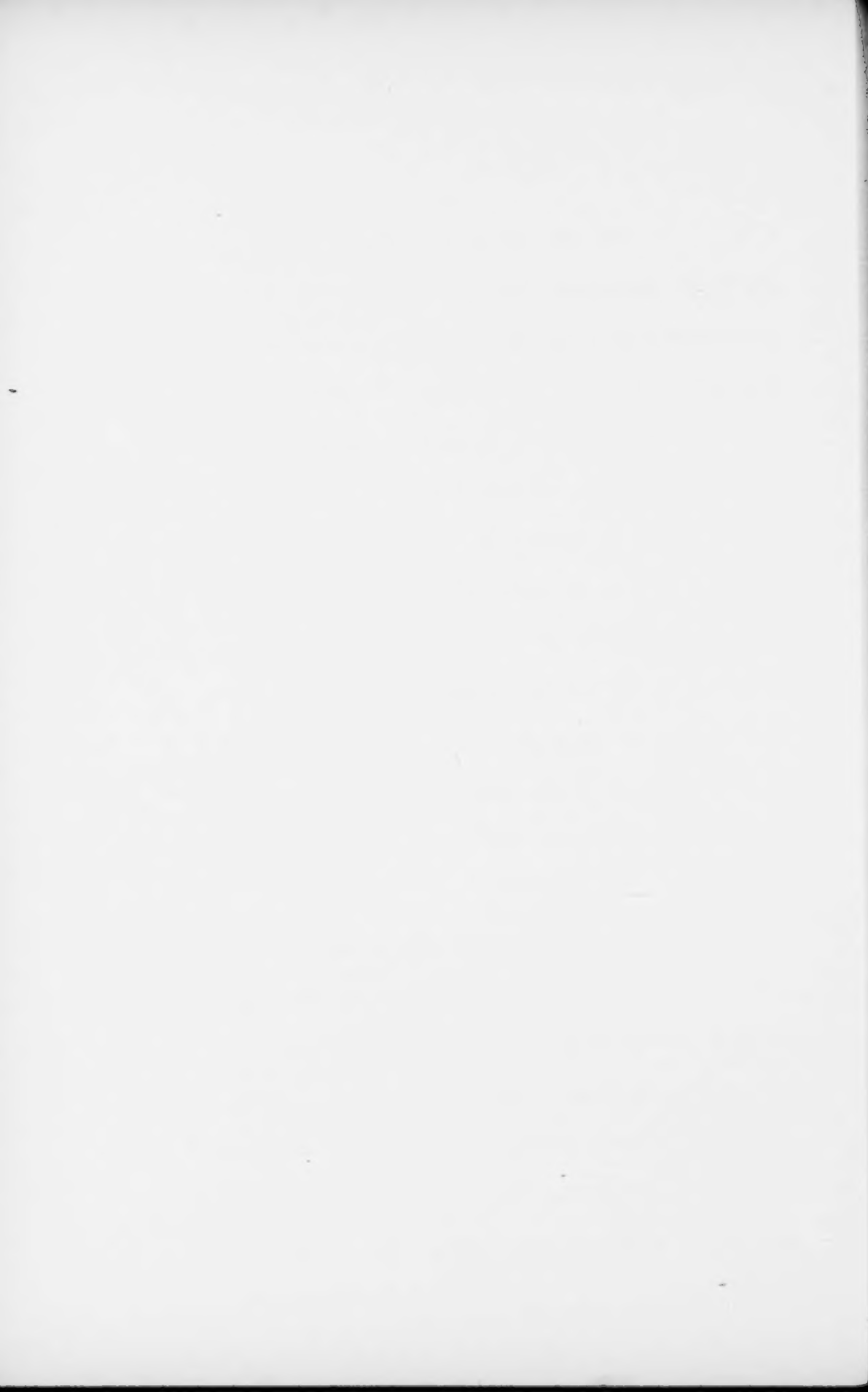


In an action, inter alia, to recover damages for diversion of partnership assets, the plaintiffs appeal from (1) an order of the Surrogate's Court, Nassau County (Radigan, S.), dated July 23, 1984, which denied their motion for a new trial, (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall resume.

Order and decree affirmed.

One bill of costs is awarded to the respondents Reed, Hackell, Citibank, Potter, Werner, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate Co., Alger Realty Co., Soto, Wilschek, J.S.K. Cleaning Services, Inc., Katz and





Volume Feeding, Inc., appearing separately and filing separate briefs.

The Surrogate is directed to resume the trial on the seventeen the cause of action with all convenient speed.

The instant action was commenced by the decedent Simon Cohen's son individually and as a general and limited partner, on behalf of various partnerships. The complaint essentially alleges that the decedent conspired with the individual defendants to divert assets from the partnerships, perpetrate a fraud on the partners and waste and mismanage partnership assets. In addition, the complaint charges the executors of the decedents' estate with covering up these alleged wrongdoings. The action, originally brought in the Supreme Court, Nassau County, was transferred to the Surrogate's Court,



Nassau County, by order entered December 1, 1971. After a lengthy discovery period, then Surrogate Bennett, in an order dated January 11, 1980, dismissed the first and third causes of action on the ground that they were barred by the Statute of Limitations.

A trial commenced before then Referee Radigan in March of 1980 and continued until October of the following year, at which time, although the plaintiffs had not finished presenting their direct case, it was adjourned without a date for resumption. Prior to the adjournment, the plaintiffs moved, inter alia, for leave to substitute another attorney for the attorney of record. That branch of the plaintiffs' motion which sought the substitution was granted by order dated March 9, 1983.



In the meantime, settlement negotiations were taking place, and, in October of 1982, the plaintiffs submitted a proposed settlement to Surrogate Radigan. The defendants responded by submitting a counter-proposal. At a subsequent conference, the court informed the parties that it intended to send out a notice of settlement offer to the partners, incorporating therein the terms of the counterproposal. The notice was dated January 13, 1983, and provided for responses to be sent to the court.

In its decision dated April 6, 1983, the court analyzed the responses received from the partners, most of which were favorable, and ordered a hearing to give any objectors an opportunity to show cause why the proposed settlement should not be approved. The only partner to appear at



the hearing was the plaintiff Robert Cohen, who opposed the settlement proposal. Three conditions, proposed by various partners in response to the notice of settlement offer, were added to the settlement proposal with the defendants' consent, and the amended proposal was approved by the court in its decision dated April 27, 1984. The plaintiffs then moved for a new trial on the 16 causes of action asserted on behalf of the partnerships, as well as on the seventeenth cause of action, which the plaintiff Robert Cohen asserted individually, on the basis that the inordinate delay in resumption of the trial had prejudiced his due process rights. The court denied that motion by order dated July 23, 1984, holding that the issue was rendered moot by the court's approval of the settlement agreement. A settlement decree





incorporating the proposal was issued on November 27, 1984. The plaintiffs appeal from both the decree and the order denying the motion for a new trial, and we affirm.

This action was brought under partnership Law § 115-a, and thus could not be compromised or settled without the court's approval (Partnership Law § 115-a[4]). The plaintiffs contend that the court exceeded its authority in considering for its approval a proposal which was not actually the result of negotiations between the parties, but was an offer by the defendants. While the "power to approve a settlement does not translate into a power to dictate the terms of settlement (Lee v Gucker, 27 AD2d 722; Smith v Ford Motor Co., 38 AD2d 852)" (Sutherland v City of New York, 107 AD2d 568, 569, affd 66 NY2d 800), where it is apparent that no



meaningful settlement negotiations are being conducted, due in large part to the representative plaintiff's unwillingness to make certain concessions, and the court receives a settlement proposal it considers to be adequate, the court is not without authority to present the offer to the class of people being represented for their approval or disapproval, provided the notice sent to the class is fair and impartial, and does not indicate the court's views on the proposal. If the responses received from the members of that class are sufficiently favorable, the court may then consider the proposal for its approval, and hold a hearing on the fairness, reasonableness and adequacy of the same. In this case, this procedure was followed. Upon receipt of what it evidently considered to be an adequate compromise, the court



transmitted the offer to the partners, i.e., the members of the class being represented by the plaintiffs, for their approval. The court did not consider the offer as an agreement submitted for its approval until after it received favorable responses from a majority of the parties involved. In light of the indications in the record that the plaintiffs had some sort of personal stake in the outcome of the litigation that went beyond the representation of the partnerships, the Surrogate did not err in submitting the defendants' proposal to the partners over the plaintiffs' objection.

A review of the record reveals that the Surrogate was fully aware of the proper standards to be applied in evaluating a settlement, that he applied those standards in approving the settlement, and that he entertained no



improper considerations. As it cannot be said that his decision to approve the settlement was a clear abuse of discretion, that decision will not be overturned on these appeals (see, Officers for Justice v Civil Serv. Commn. of City and County of San Francisco, 688 F2d 615, cert denied sub nom. Byrd v Civil Serv. Commn., 459 US 1217; Cotton v Hinton, 559 F2d 1326; City of Detroit v Grinnell Corp., 495 F2d 448).

Since the Surrogate properly approved the settlement agreement, his denial of the plaintiffs' motion for a new trial on the causes of action which were settled and discontinued by the settlement decree was not improper. However the trial, adjourned sine die in October of 1982, should be resumed with all convenient speed insofar as it relates to the cause of action asserted





by the plaintiff Robert Cohen  
individually.

In light of the foregoing we  
need not reach the other issues raised  
by the plaintiffs, inter alia, with  
respect to the reviewability of the  
dismissal of the third cause of action.  
We have considered the plaintiff's  
remaining contentions and find them to  
be without merit.

MANGANO, J.P., THOMPSON, NIEHOFF and  
RUBIN, JJ., concur.

May 5, 1986



APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X

Robert Cohen, etc., : Index No.  
et al., : 148704

:  
Appellants, :  
v. : ORDER

:  
Robert J. Reed, et al., :  
Respondents. :

-----X

In the above entitled action, inter alia, to recover damages for diversion of partnership assets, the above named Robert Cohen, etc., et al., plaintiffs, having appealed to this court from (1) an order of the Surrogate's Court, Nassau County, dated July 23, 1984, which denied their motion for a new trial (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall



resume; and the said appeals having been argued by Michael E. Schoeman, Esq., of counsel for appellants, argued by Robert W. Corcoran, Esq., and Michael H. Soroka, Esq., of counsel for respondents Robert Reed, Sidney Hackell, Citibank, Beatrice Potter, William B. F. Werner, Individually and D/B/A Mid-Island Hospital, Dadgab, Inc., Brimco, Inc., Simon Cohen Real Estate Co. and Aljer Realty Co., argued by Murray Koven, Esq., of counsel for Judah Feinerman and Jasdane, Inc., and submitted by Albert J. Fiorella, Esq., of counsel for respondents Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc. Sheldon Katz and Volume Feeding, Inc., due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is



ORDERED that the decree  
appealed from are hereby unanimously  
affirmed, and it is further

ORDERED that one bill of costs  
is hereby awarded to the respondents  
Reed, Hackell, Citibank, Potter, Werner,  
Dadgab, Inc., Brimsco, Inc., Simon Cohen  
Real Estate Co., Aljer Realty Co., Soto,  
Wilschek, J.S.K. Cleaning Services,  
Inc., Katz and Volume Feeding, Inc.,  
appearing separately and filing separate  
briefs, and it is further

ORDERED that the Surrogate is  
hereby directed to resume the trial on  
the seventeen cause of action with all  
convenient speed.

E N T E R

/s/  
Acting Clerk of the  
Appellate Division

[ENTERED May 5, 1986.]





SUPREME COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Index No.  
ually and as a partner : 15889/71  
of SIMON COHEN REAL :  
ESTATE & MANAGEMENT :  
CO., a limited part- :  
nership, etc. :

Plaintiff,

- against -

ROBERT J. REED, indi- :  
vidually and as Execu- :  
tor of the Last Will :  
and Testament of SIMON :  
COHEN, Deceased, :  
et al. :

Defendants.

-----X

Upon the foregoing papers it  
is ordered that this motion be  
defendants for an order transferring  
this action for all purposes to the  
Surrogate's Court, Nassau County, is in  
all respects granted. Defendants have  
sought the consent of the Surrogate to  
such transfer, and in his decision dated  
November 24, 1971 the Surrogate



concluded that "in reading the complaint there is no doubt that the allegations therein directly bear on the proper administration of the estate. There are serious allegations concerning possible breach of fiduciary relationship between the executors and this court feels that there is sufficient reason to have all the outstanding claims and disputes determined in one court."

Three of the eleven stated caused of action seek substantial money awards against the estate of Simon Cohen, and the remaining claims are asserted wholly or partially against the Simon Cohen Real Estate & Management Company, the Simon Cohen Realty Company and the Simon Cohen Company. Simon Cohen was the owner of a substantial interest in each of these three enterprises (59%, 40%, and 86%, respectively), and that percentage is



now held by his estate. Accordingly, it is frivolous of plaintiff, Simon Cohen's son, to assert that these remaining causes of action do not directly affect the management of Simon Cohen's estate, an estate already within the jurisdiction of Surrogate Bennett.

For all of these reasons the motion is granted and the action is respectfully transferred for all purposes to the Surrogate's Court. Serve a copy of this order upon the Clerk of the Surrogate's Court, Nassau County.

s/  
Hon. Daniel G. Albert

[Entered December 1, 1971.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : File No. 148704  
ually and as a partner  
of SIMON COHEN REAL :  
ESTATE & MANAGEMENT  
COMPANY, a limited :  
partnership, suing on  
behalf of himself and  
all other partners, :  
general and limited, of  
the said SIMON COHEN :  
REAL ESTATE & MANAGE-  
MENT COMPANY, similarly:  
situated, and in the  
right of the SIMON :  
COHEN REAL ESTATE &  
MANAGEMENT COMPANY, : DECISION  
and as a partner of  
SIMON COHEN REALTY :  
COMPANY, a limited  
partnership, suing on  
behalf of himself and :  
all other partners,  
general and limited, :  
of the said SIMON  
COHEN REALTY COMPANY, :  
and as a partner of  
SIMON COHEN COMPANY, :  
a limited partnership,  
suing on behalf of :  
himself and all other  
partners, general and :  
limited, of SIMON COHEN  
COMPANY, similarly :  
situated, and in the  
right of SIMON COHEN :  
COMPANY, :

Plaintiff,





-against- :

ROBERT J. REED, indi- :  
vidually and as execu- :  
tor of the Last Will :  
and Testament of SIMON :  
COHEN, deceased, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
as additional executors :  
of the Last Will and :  
Testament of SIMON :  
COHEN, deceased; :  
WILLIAM E.F. WERNER, :  
individually and doing :  
business as MID-ISLAND :  
HOSPITAL: SIMON COHEN :  
REAL ESTATE & MANAGE- :  
MENT COMPANY, SIMON :  
COHEN COMPANY, :

Defendants. :

-----X

In the above action,  
transferred to this court by the Supreme  
Court, it appears that an examination of  
the plaintiff has been conducted on  
various dates pursuant to a notice of  
deposition served by the defendants with  
their answer almost a year ago. By  
cross notice served by the plaintiff,  
one of the defendants is to be examined



and by stipulation of the attorneys, it was agreed that the examination of the defendant Reed was to proceed immediately after completion of the examination of the plaintiff Robert Cohen.

The examination of Robert Cohen accordingly proceeded on July 6, July 20 and September 13, 1972. It appears that the examination was scheduled again for October 6, 1972, cancelled and rescheduled for October 13, 1972, but on the latter date, the witness was late, due, it is said, to a misunderstanding on his part. Instead of rescheduling the examination, counsel for the plaintiff now move for a protective order terminating the plaintiff's deposition and directing that the defendant's deposition proceed.

In opposition, counsel for the defendants deny any fault and in fact



the court is unable to determine from the papers submitted that either counsel or the witnesses were at fault in not continuing the examination on the last date scheduled and neither can the court find, under the circumstances, that the examination had been unduly prolonged. Counsel for the defendants, however, state their belief that the plaintiff's examination will be completed in one more session.

Under the circumstances the motion is denied without prejudice to a renewal of the same if the current deposition does not progress expeditiously. Counsel are directed to communicate with their reporter and arrange a satisfactory time for the adjourned examination and in the event that they cannot agree, the examination is hereby directed to take place in this court on November 30, 1972 at 9:30 a.m.



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Proceed accordingly.

Dated: November 17, 1972.

---

JOHN D. BENNETT  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : File No.  
ually and as a partner : 148704  
of SIMON COHEN REAL :  
ESTATE & MANAGEMENT :  
CO., a limited part- :  
nership, etc. :

: DECISION  
Plaintiffs,

- against -

:  
ROBERT J. REED, indi-  
vidually and as Execu-  
tor of the Last Will :  
and Testament of SIMON :  
COHEN, Deceased, :  
et al. :

:  
Defendants.

-----X

The motion to stay the  
examinations before trial which are  
presently being conducted is denied.

The fact that the executors  
intend to file an accounting is no  
justification for delaying the progress  
of this proceeding. The additional  
contention that the plaintiff may later  
amend the complaint and thereby require



further examination before trial is equally without force since the court will not allow any additional examinations at that time if it is shown that it would be to the detriment of any of the parties.

Proceed accordingly.

Dated: July 24, 1973

s/  
JOHN D BENNETT  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

In the Matter of the : ORDER  
Application of ROBERT  
COHEN for a decree re- : File No.  
moving the Trustees of : 148704/1971  
the Robert Cohen Trust :  
established under the  
Last Will and Testament:  
of Simon Cohen,  
late of the County of :  
Nassau, deceased.

-----X

Upon reading and filing the  
petition of ROBERT COHEN duly verified  
the 13th day of November, 1973, praying  
for a decree pursuant to S.C.P.A. §711  
revoking the Letters of Trusteeship of  
the trust created under the second  
codicil of the Last Will and Testament  
of Simon Cohen, decedent above named,  
issued to BEATRICE POTTER, SIDNEY  
HACKELL, ROBERT J. REED and THE FIRST  
NATIONAL CITY BANK, and removing and  
replacing said trustees on the ground  
that they have breached and violated



their trust by acting out of hostility and spite to injure the life beneficiary without due regard for their duty to administer the trust in the interests of the beneficiary, and that the Surrogate's Court having entertained the proceeding,

NOW, on motion of STEINHAUS AND HOCHHAUSER, attorneys for the said petitioner, it is -

ORDERED, that a citation be issued directed to BEATRICE POTTER, SIDNEY HACKELL, ROBERT J. REED and THE FIRST NATIONAL CITY BANK as such trustees citing them to show cause why a decree should not be made accordingly.

ORDERED, that pending the hearing and determination of this petition that BEATRICE POTTER, SIDNEY HACKELL, ROBERT J. REED and THE FIRST





NATIONAL CITY BANK be and the same hereby are enjoined from, and their powers are suspended to the extent of prohibiting them from, consummating a sale of the corpus of the Trust, namely, the property located at 1378 Main Avenue, Clifton, New Jersey, to Monmouth Real Estate Investment Trust or to any other entity.

/s/  
JOHN D. BENNETT  
Judge of the  
Surrogate's Court

[ENTERED November 20, 1973.]



SURROGATE'S COURT:  
NASSAU COUNTY

-----X

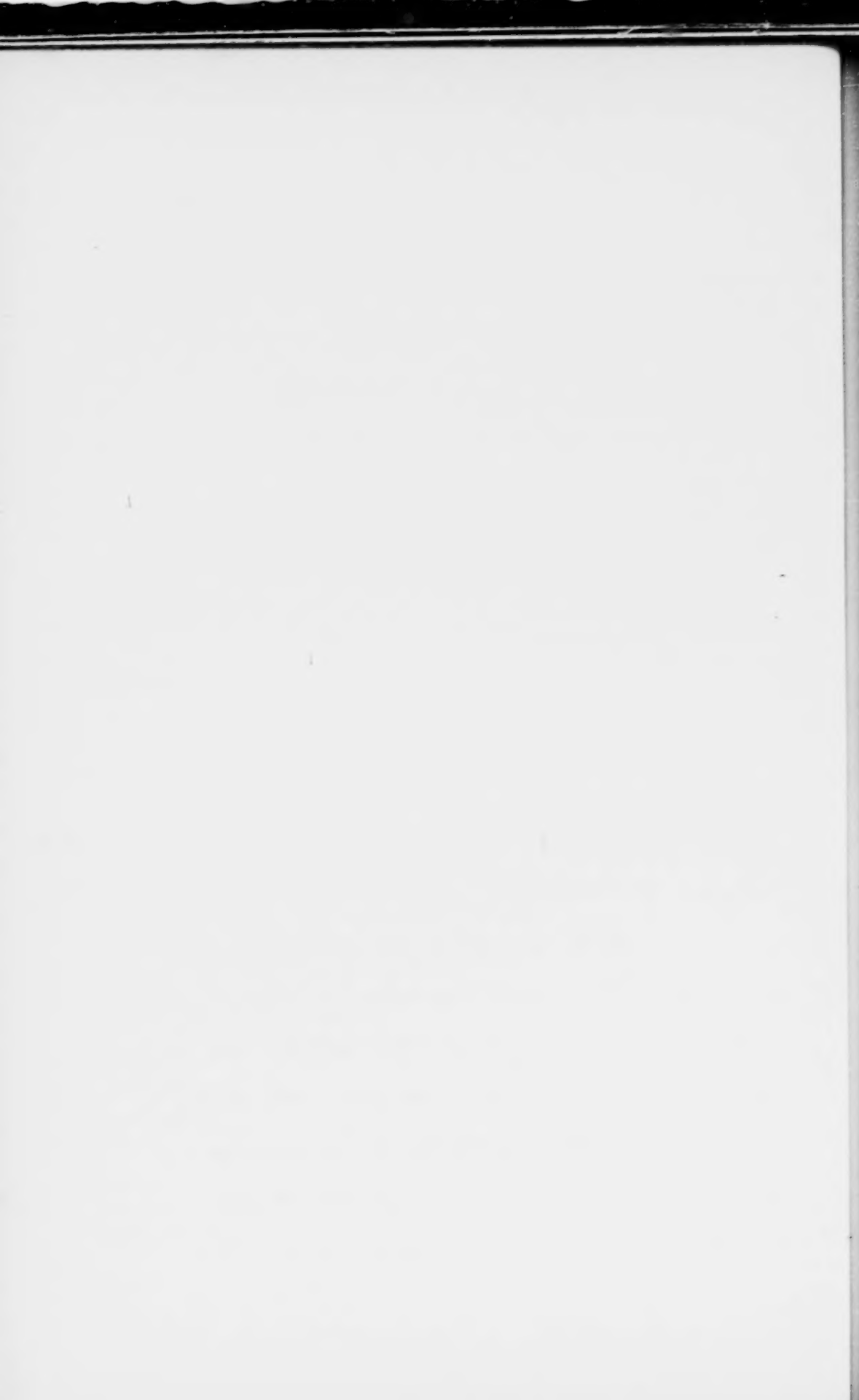
In the Matter of the : DECISION  
Application of ROBERT  
COHEN for a decree re- : File No. 148704

moving the Trustees of  
the Robert Cohen Trust :  
established under the  
Last Will and Testament:  
of SIMON COHEN,  
late of the County of :  
Nassau, deceased.

-----X

In this proceeding to revoke  
the letters of the trustees the  
respondents have made a motion to  
dismiss the petition.

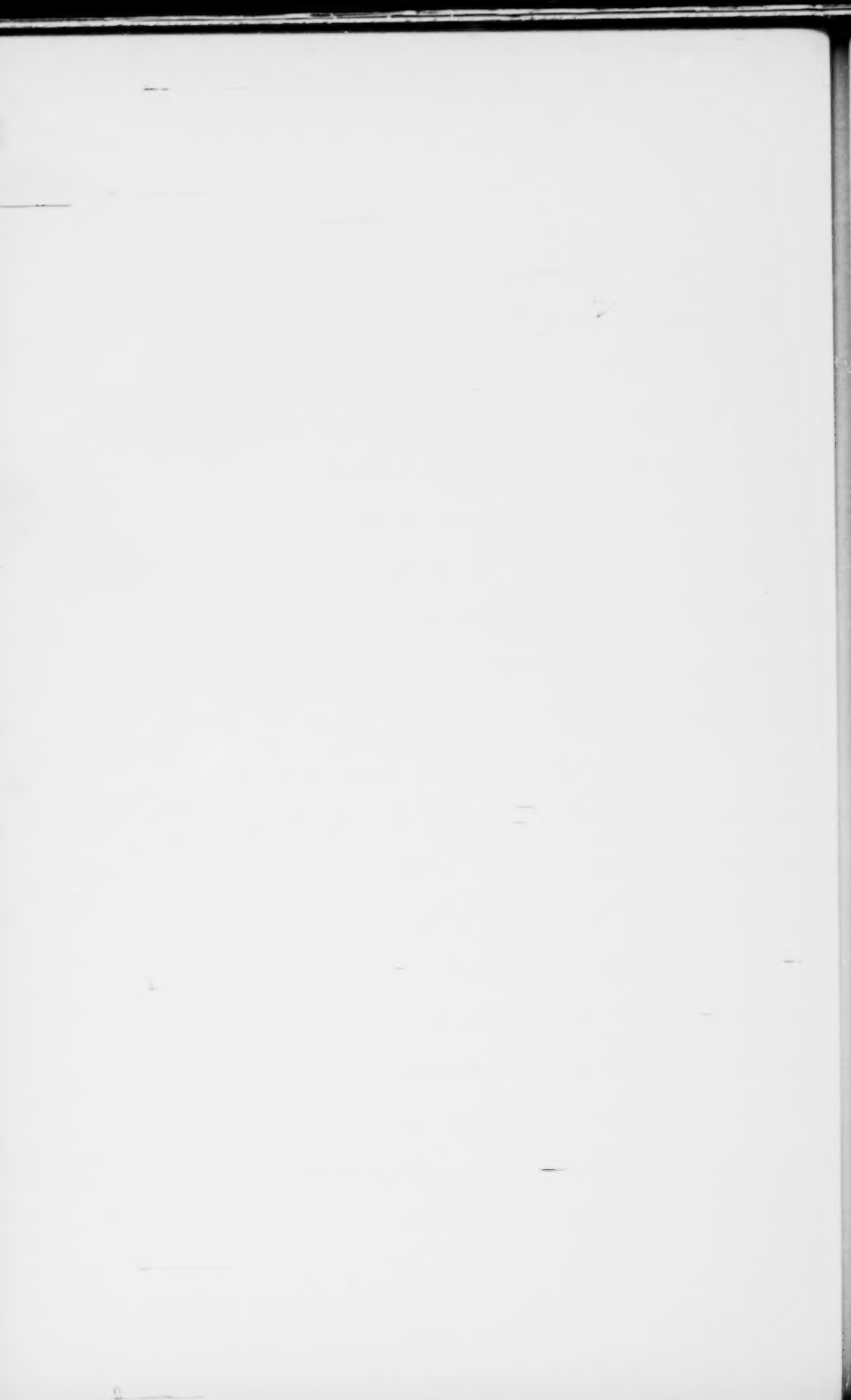
SCPA 711 sets out specific  
grounds under which fiduciaries may be  
removed. The thrust of the petitioner's  
argument is that the trustees have sold  
a parcel of real property motivated by  
malice and hostility. This matter of  
the sale of the real property was the



subject of a prolonged hearing before this court wherein all parties were heard and presented opposing views. On October 30, 1973 the court rendered its decision denying the petitioner's petition for advice and consent but expressly refusing to disapprove the sale, finding that the question was not one of law but of business judgment on the part of the trustees.

The court finds that the petitioner's allegations do not fall within the purview of SCPA 711 (Matter of Puglisi, 205 Misc. 773, affd. 285 A D 890). Accordingly, the court grants respondent's motion to dismiss the petition to revoke letters.

Settle decree on five days' notice with three additional days if



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service is made by mail.

Dated: February 6, 1974.

JOHN D. BENNETT  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

In the Matter of the : D E C R E E  
Application of ROBERT  
COHEN for a decree re- : File #148704  
moving the Trustees of  
the Robert Cohen Trust :  
established under the  
Last Will and Testament:  
of SIMON COHEN,  
late of the County of :  
Nassau, deceased.

-----X

Upon reading and filing the  
Order to Show Cause herein dated  
November 20, 1973, the petition of  
ROBERT COHEN herein, verified the 13th  
day of November, 1973, the answer  
herein, dated the 11th day of December,  
1973, and all of the papers attached  
thereto, upon the Notice of Motion of  
the respondent Trustees to dismiss this  
proceeding, which motion was dated  
December 26, 1973, upon the affidavit of



ROBERT J. REED, sworn to the 2nd day of January, 1974, submitted in support of the Trustees' aforesaid motion to dismiss; and upon all of the pleadings and proceedings heretofore had herein; and the Petitioner having appeared by STEINHAUS & HOCKHAUSER, ESQS., and the Respondents having appeared by SPENO, GOLDBERG, MOORE, MARGULES & CORCORAN, ESQS.; and the Court having received written memoranda of the respective parties hereto; and the Court having rendered a decision herein in writing on the 6th day of February, 1974, it is

ORDERED, ADJUDGED AND DECREED,  
that the motion of the Respondent



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Trustees to dismiss the petition herein  
is granted.

/s/  
JOHN D. BENNETT  
Judge of the  
Surrogate's Court

[ENTERED February 28, 1974.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, et al.,  
Plaintiff, : ORDER OF  
: REFERENCE  
:   
- against - : File No. 148704

ROBERT J. REED, et al.,:

Defendants :

-----X

It appearing from the petition  
and papers submitted in opposition  
thereto that issues of fact have been  
raised in the above entitled proceeding,  
it is

ORDERED that said matter be  
referred to

C. RAYMOND RADIGAN,  
as Referee, to hear the proofs of the  
parties on all questions and issues  
arising therein and make a report





A21

thereon to the court with all convenient speed.

/s/ John D. Bennett  
Judge of the  
Surrogate's Court

[ENTERED May 16, 1979.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

DECISION

ROBERT COHEN, Individ- : File No. 148704  
ually and as a Partner : No. 42  
of Simon Cohen Real :  
Estate & Management  
Co., Simon Cohen Realty:  
Co., suing on behalf of  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B. F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

A decision having been rendered on March 27, 1979 determining that a motion for summary judgment and a motion to dismiss would be considered in the above captioned proceeding, the attorneys for all parties are hereby advised that all additional memoranda in connection with said motions are to be submitted on or before July 23, 1979.

Proceed accordingly.

Dated: July 12, 1979.

JOHN D. BENNETT  
Judge of the  
Surrogate's Court

/s/ 7/23/79 - So Ordered



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

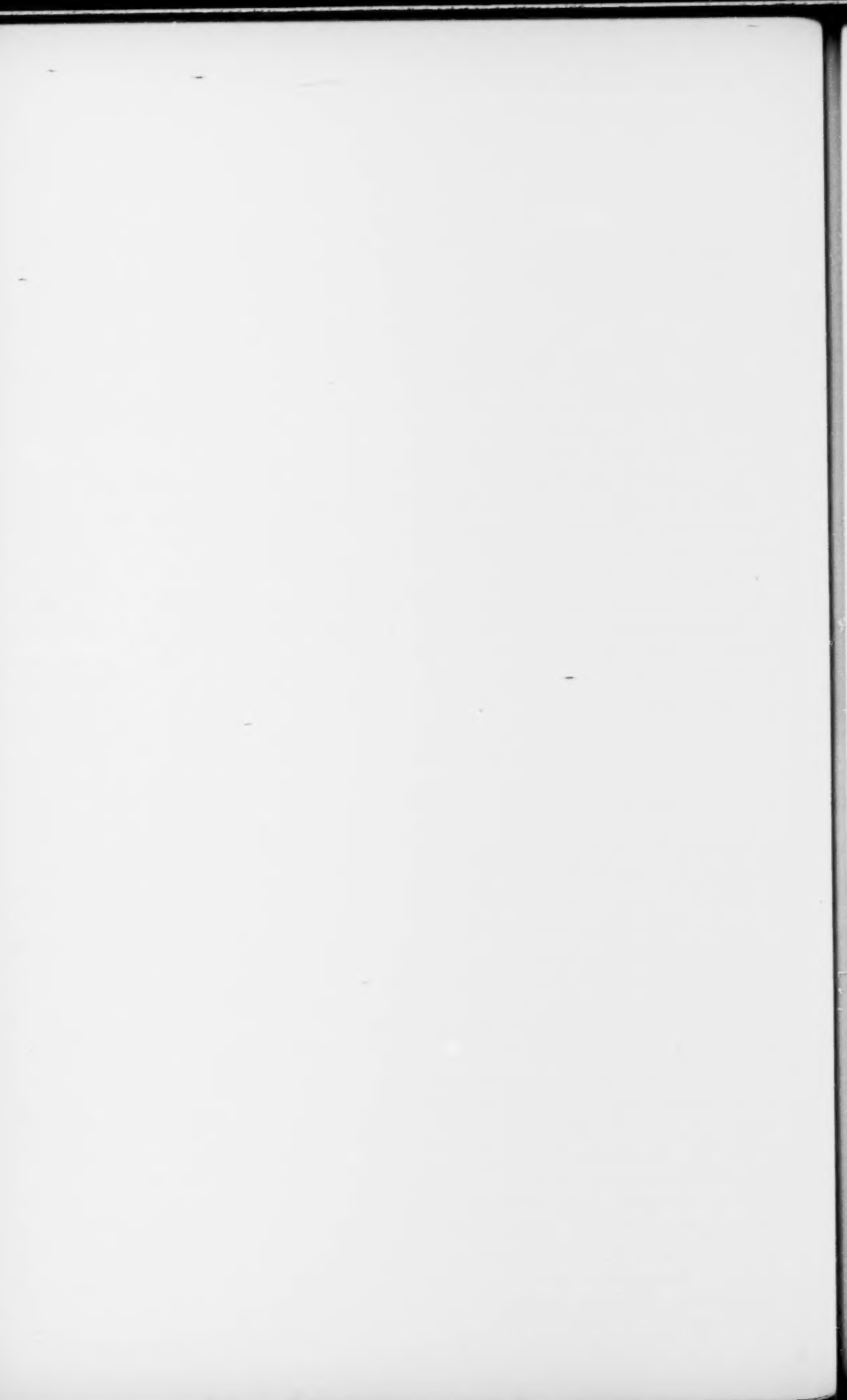
ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty: :  
Co., suing on behalf of :  
himself and all other : File No. 148704  
partners, both general :  
and limited, and in the:  
right and on behalf of :  
Simon Cohen Real Estate: REPORT OF  
& Management Co., Simon REFEREE  
Cohen Realty Co., Simon:  
Cohen Company, and :  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
Simon Cohen, Deceased, :  
WILLIAM B. F. WERNER, :  
Individually and doing :  
business as Mid Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC., :  
BRIMSCO, IC., SIMON :





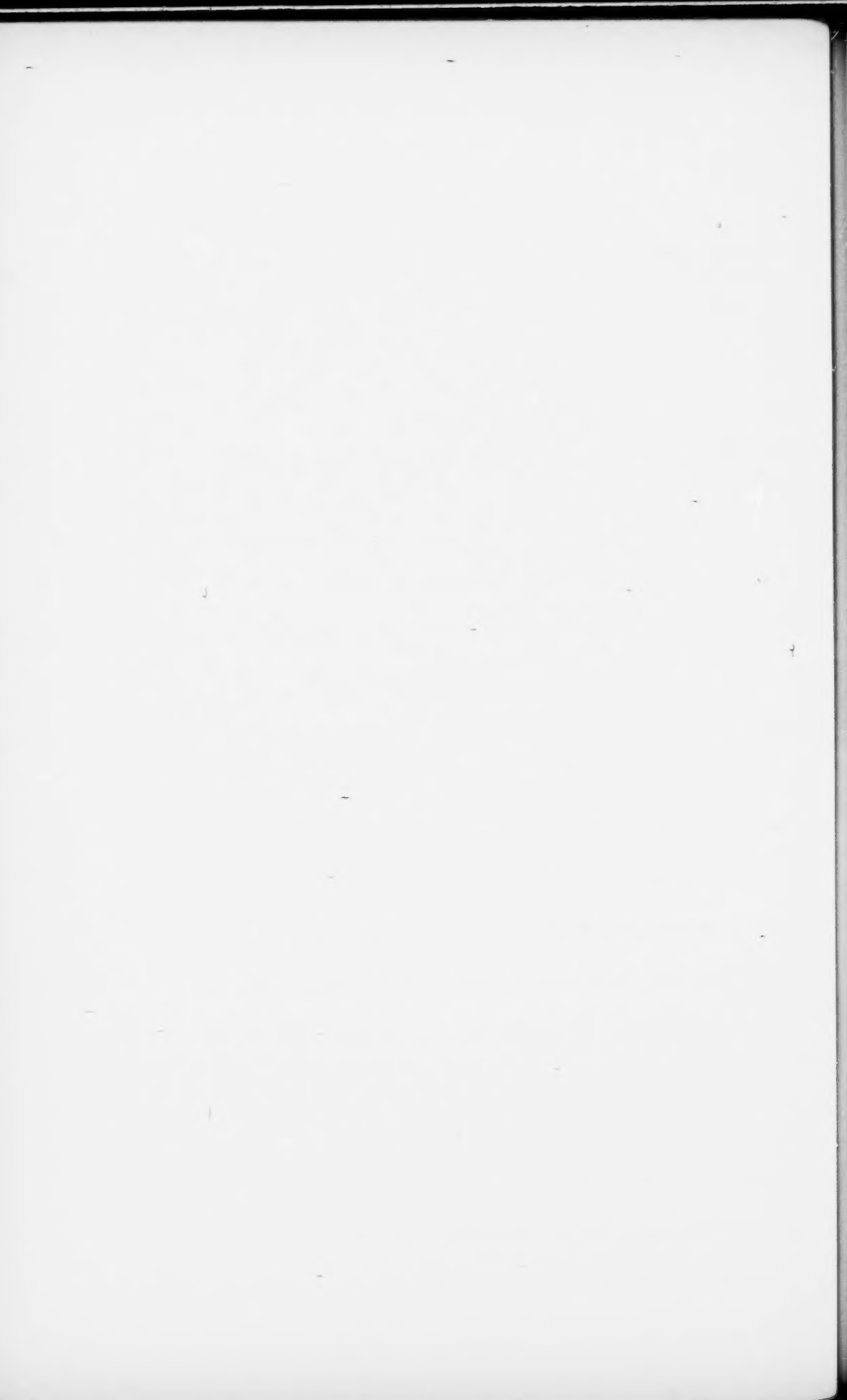
COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

TO THE SURROGATE'S COURT OF THE COUNTY  
OF NASSAU:

This is an action by Robert Cohen, son of the decedent Simon Cohen, individually and on behalf of the partners of various partnerships, against the executors of his father's estate individually for conspiracy to defraud and in their fiduciary capacities for fraud alleged to have been committed by the decedent and for breach of fiduciary duty to creditors of the estate. In addition, it is alleged that the decedent and one of the executors of his estate, Robert Reed, breached their fiduciary duty to the Simon Cohen Real Estate and Management Company (hereinafter SCREAM) by



mismanagement and waste and by siphoning funds due and owing from the Mid-Island Hospital (hereinafter M-I-H) to SCREAM through "satellite" businesses and individuals who are defendants in this proceeding. M-I-H and its owner and operator William Werner are also defendants.

Additionally, the complaint alleges fraud and breach of trust by Simon Cohen and Robert Reed individually in connection with other partnerships and seeks accountings from Reed and the executors of the estate of Simon Cohen. It is also alleged that Simon Cohen clandestinely borrowed money from the partnerships without payment of interest.

The plaintiff seeks reformation of a sublease between SCREAM and M-I-H to permit SCREAM to inspect and audit the hospital's books and



records and a declaratory judgment granting virtually the same relief.

The defendants had previously moved for an order dismissing each cause of action and for an order granting summary judgment. The court reserved decision pursuant to subdivision (d) of CPLR 3211 to allow the parties to exhaust all discovery and disclosure devices which has now been completed. Reargument of the previous motion for summary judgment was made before me as referee pursuant to an order of this court made on May 16, 1979 and I respectfully report as follows:

Turning first to the motion to dismiss the fourth, fifth, sixth, eighth, ninth and tenth causes of action, the defendants contend that the plaintiff is barred by the statute of limitations on the ground that he knew



or had reason to know of the allegedly fraudulent acts prior to 1971 when this suit was commenced.

The defendants' argument is based in part on a misinterpretation of subdivision (8) of CPLR 213 which requires that an action based on fraud be commenced within six years and provides that the "time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud or could with reasonable diligence have discovered it".

This clause, which requires that the computation of time be made from the date of discovery or imputed discovery has the effect of extending the six year period rather than limiting it. The six year period is tolled until such time as discovery is made or could





reasonably have been made. The statute of limitations is the later of six years from the date of the commission of the fraud or two years from the time the plaintiff discovered the fraud or could have discovered it (CPLR 203 subd [f]: McCabe v Gelfand (57 Misc 2d 12, vacated on other grounds, 58 Misc 2d 497)).

Subdivision (8) of CPLR 213 applies only to those causes of action which are predicated on actual fraud rather than constructive fraud. A cause of action based on constructive fraud is controlled by subdivision (1) of CPLR 213, the six year statute of limitations governing equitable actions in general (Curry v Chollette, 57 AD 2d 604, affd 43 NY 2d 984) whereas subdivision (8) of CPLR 213 applies to actions predicated on actual fraud.

Where it is alleged that there is a breach of fiduciary duty the test



to be applied to determine if the cause of action is based on constructive or actual fraud is whether it is alleged that there was a design to mislead the plaintiff by misrepresentations of fact or concealment of facts (Quadrozzi Concrete Corp v Mastroianni, 56 AD 2d 353).

Where such a plan is alleged, the cause of action is predicated on actual fraud and subdivision (8) of CPLR 213 applies (Erbe v Lincoln Rochester Trust Co, 3 NY 2d 321).

In the present case, the plaintiff alleges that Simon Cohen and Robert Reed participated in a conspiracy to divert funds from the Simon Cohen Realty Company (hereinafter SCR) and to transfer funds belonging to SCREAM to other businesses and individuals. To this extent the complaint alleges actual fraud. In addition, there are allegations of actual fraud against



Werner/M-I-H, First National City Bank (hereinafter Citibank), Robert Reed, Beatrice Potter, and Sidney Hackell in their individual and fiduciary capacities as well as other defendants listed in the tenth cause of action.

It is apparent that the six-year statute of limitations without the benefit of the accrual provision does not constitute a bar to the eighth and ninth causes of action, the material elements of which were contained in the original complaint filed in 1971. An amended and supplemental complaint was filed in August 1974. Both complaints seek relief for misconduct alleged to have occurred in 1968 and subsequent hereto.

As to the fourth cause of action which seeks an accounting from Simon Cohen's executors and Reed individually with respect to the



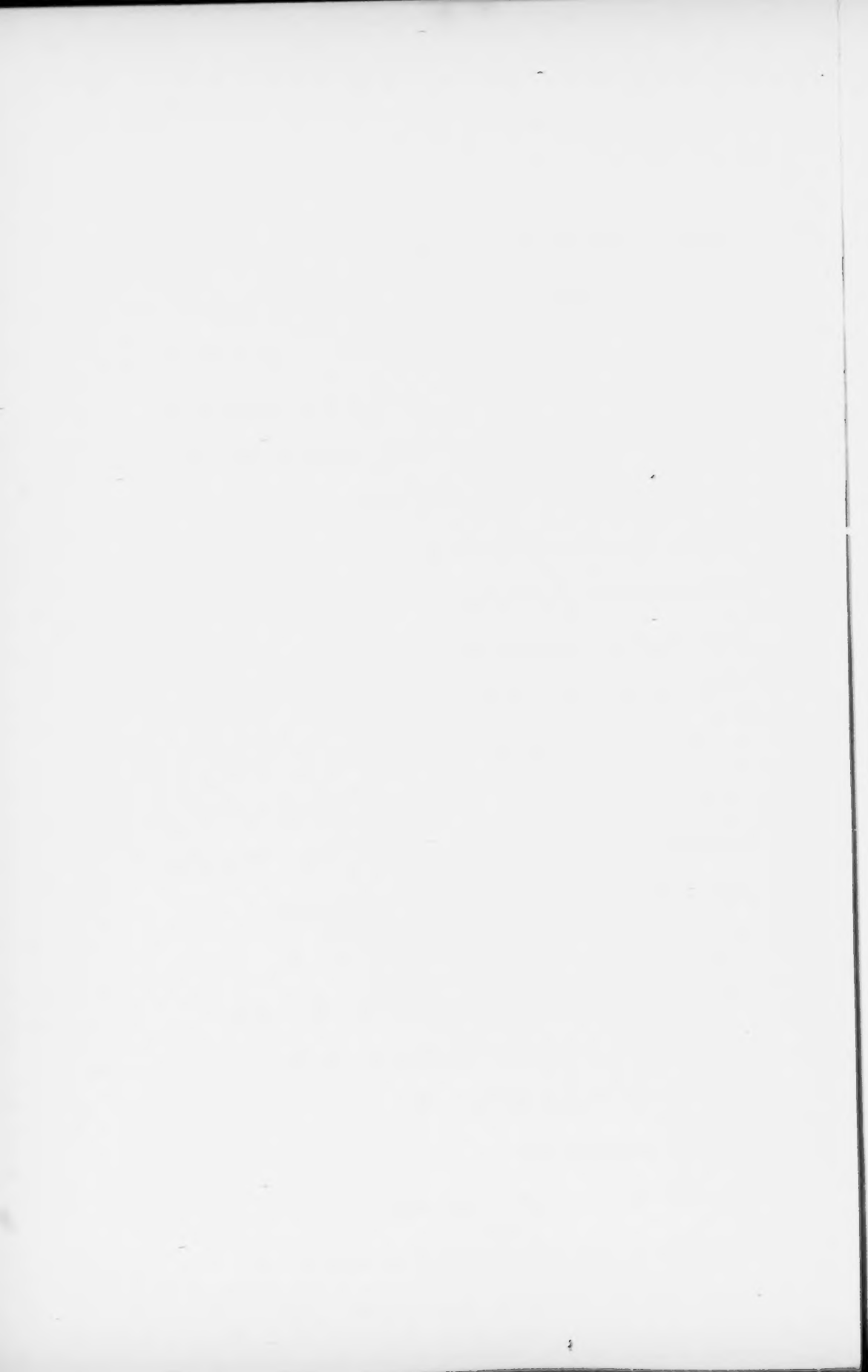
operation of SCR, the elements of this cause of action were present in the original complaint.

The fifth and sixth causes of action seek damages from Werner/M-I-H and Potter, Citibank, Hackell and Reed individually. However, there were no allegations against Citibank, Hackell and Potter individually with respect to SCR in the original complaint.

Allegations against Werner/M-I-H and Reed individually in connection with the alleged diversion of funds from SCR were present in the original complaint.

A claim asserted in a complaint is interposed against the defendant when the summons is served (CPLR 203 subd [b]). An action is deemed commenced as of the date of service of an amended complaint when the complaint is amended as a matter of grace so as to set out a new cause of





action based on an obligation or liability different from that originally pleaded (*Guntzer v County of Westchester*, 273 App Div 966, affd 298 NY 755).

In the present case, the allegations against Potter, Hackell and Citibank individually concerning SCR first appeared in the amended and supplemental complaint filed in August 1974. The statute of limitations would therefore be six years before August 1974 or two years from discovery or imputed discovery of the fraud, whichever is longer.

Where a plaintiff can reasonably be expected to be aware of the facts which may constitute fraud, discovery will be imputed to him. Imputed knowledge is a mixed question of law and fact and it is only where it conclusively appears that the plaintiff



had knowledge of the facts that the complaint should be dismissed on motion (Trepuk v Frank, 44 NY 2d 723; Azoy v Fowler, 57 AD 2d 541).

However, in particularly clear cases, summary judgment can be granted especially where the plaintiff's own version of the facts as set forth in his affidavit demonstrates without any doubt that he could have discovered the fraud within the statutory period had he used reasonable diligence (Rickel v Levy, 370 F Supp 751; cf. Friedlander v Feinberg, 369 F Supp 917, affd w/o opn 508 P 2d 836).

It is the plaintiff's individual knowledge which determines whether the action is time barred (Rickel v Levy, supra; Friedlander v Feinberg, supra; but see Mencher v Richards, 256 App Div 280).



In the present case, the plaintiff states in an affidavit in opposition to the defendants' motion for summary judgment that "the interim financial statement of SCR which Mr. Hackell sent to me in mid-December 1970 indicated substantial loans from SCR to the hospital and from SCR to my father \* \* \* ."

Based on the affidavits submitted by the plaintiff as well as the defendants, it is clear that the plaintiff was either aware in 1970 of the allegedly fraudulent acts complained of or could with reasonable diligence have discovered the facts at or about that time or at least before 1973 and accordingly he will not be afforded the benefit of the accrual provision.

(McCabe v Gelfand, supra). The six-year statute of limitations, when applied without the two-year provision to the

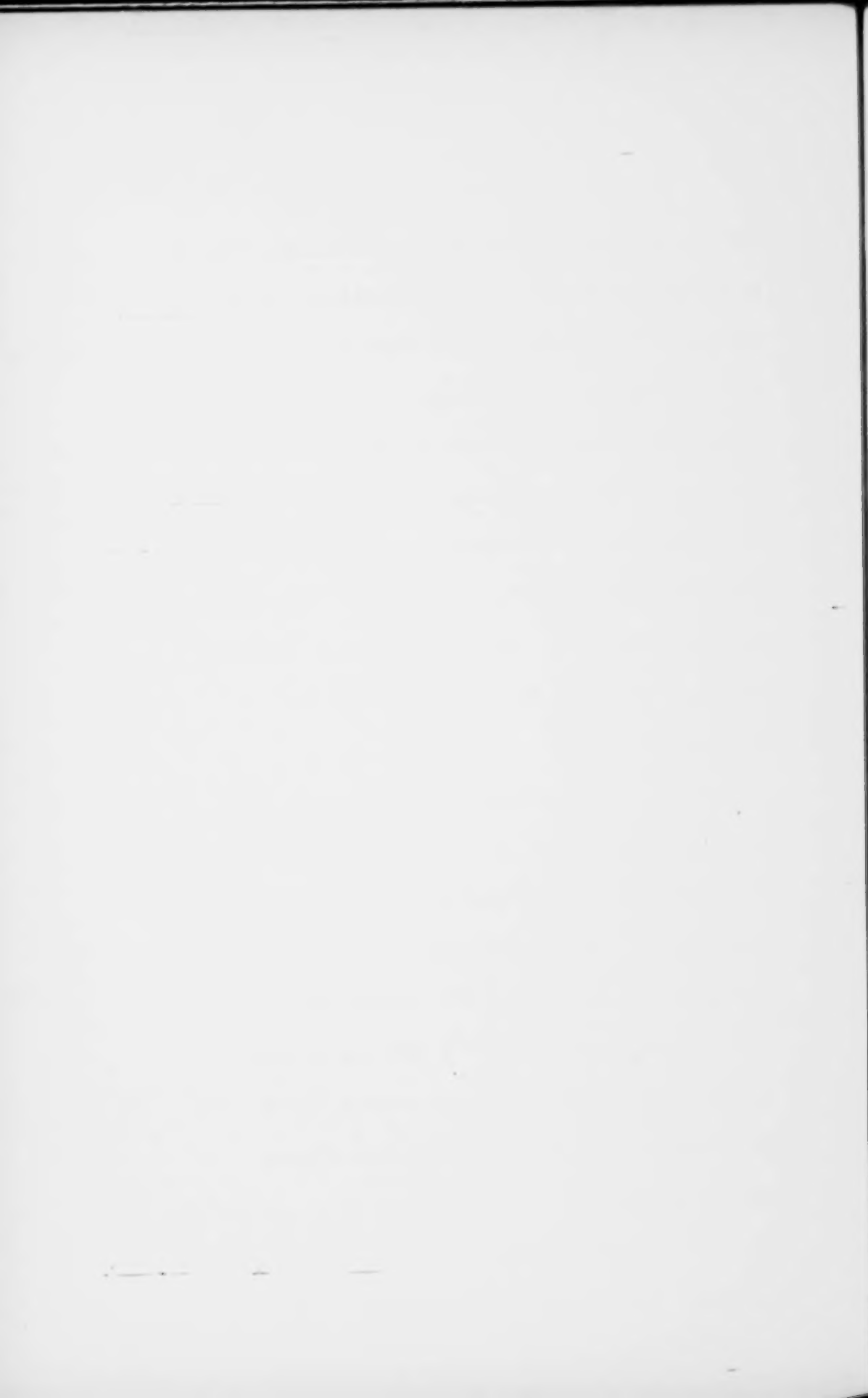


fifth and sixth causes of action, would presumably bar all allegations of fraud against the defendants Hackell, Potter and Citibank individually for an acts of fraud alleged to have occurred prior to August 1968. However, since an issue of fact exists as to precisely when each of the acts complained of may have occurred neither the motion for summary judgment nor the motion to dismiss can be granted.

With respect to Robert Reed individually and as executor, the statute of limitations does not bar the fourth, fifth and sixth causes of action since the substance of these causes of action were present in the original complaint, and Reed was named as a defendant in connection with those allegations.

As to the tenth cause of action, although the amended and

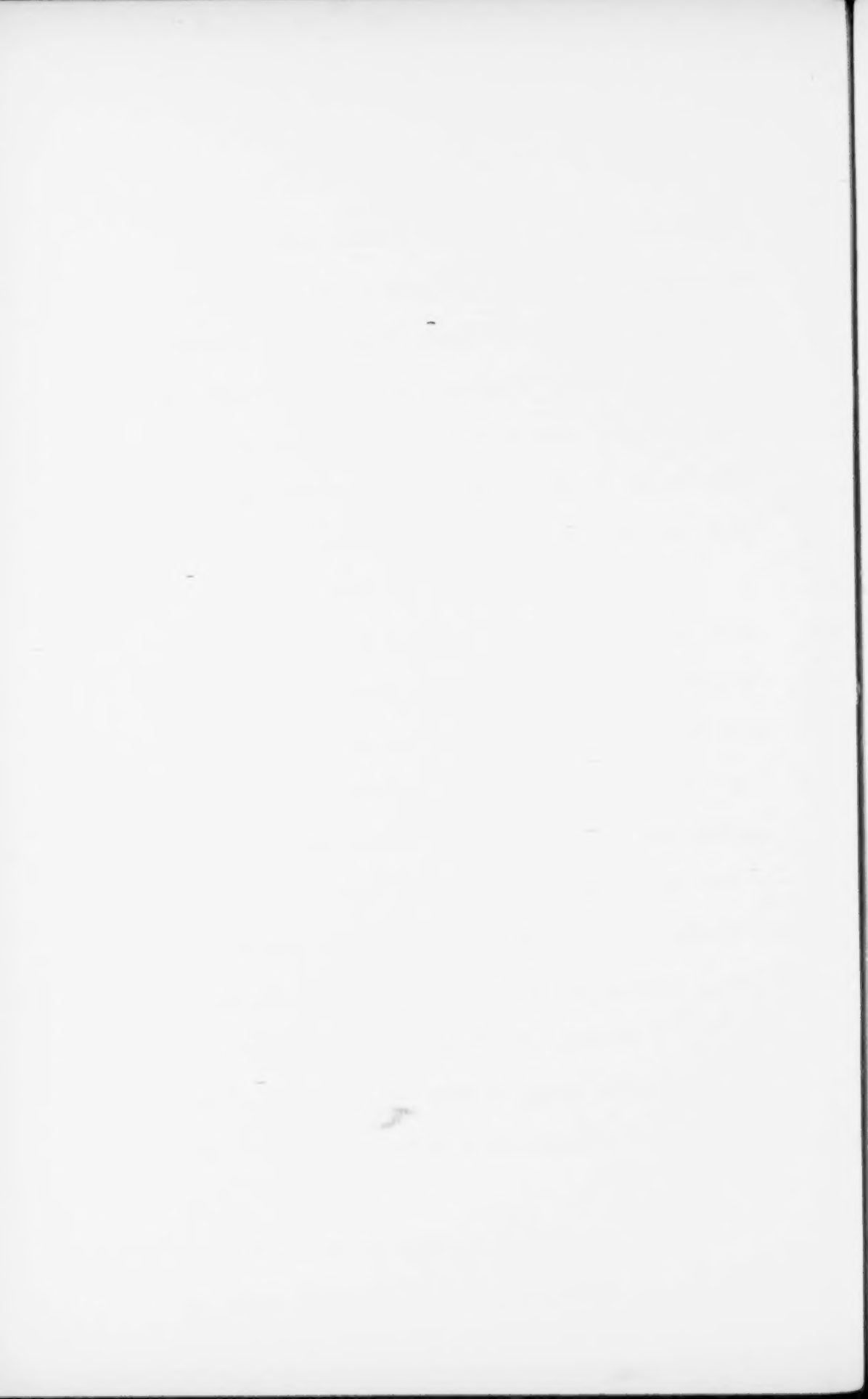




supplemental complaint added certain defendants to the allegations of fraud with respect to SCREAM, the question as to whether the accrual provision applies and whether the six year limitation in itself is a bar, cannot be resolved at this stage in the proceedings.

Turning next to the motion to dismiss the first, second and third causes of action on the ground that they are barred by the statute of limitations, the first cause of action seeks reformation of a sublease between M-I-H and SCREAM based on mutual mistake. A cause of action to reform a lease based on mutual mistake with no claim of fraud, accrues upon execution and delivery regardless of when it was discovered (*Nichols v Regant Properties*, 49 AD 2d 847).

The first cause of action accrued on February 1, 1968, the date of



the execution of the contract. It is barred by subdivision (6) of CPLR 213, the six year statute of limitations for actions based on mistake.

The second cause of action seeks reformation of the sublease based on fraud and mistake.

Where mistake and fraud are alleged, subdivision (8) of CPLR 213 may apply (*Metropolitan Life Insurance Co v Oseas*, 261 App Div 768, affd w/o opn, 289 NY 731) and the plaintiff may be entitled to the benefit of the accrual provision depending upon the nature of the fraud and the effect it had on the plaintiff's ability to discover the mistake (c.f. *Goodbody & Co v Stern*, 93 Misc 2d 109).

In the present case, a determination as to whether the alleged fraud of Simon Cohen or others contributed to a mistake thereby making



subdivision (8) applicable should not, under the circumstances, be made on motion. Likewise, the determination as to whether the accrual provision will then apply cannot be made on the affidavits submitted.

The third cause of action is for a declaratory judgment permitting an inspection and audit of the books and records of M-I-H.

There is no statute of limitations specifically applicable to an action for a declaratory judgment. The statute of limitations employed in a particular case is that which would have been applied had coercive relief been sought (3 Weinstein-Korn-Miller, NY Civ Prac ¶3001.19). A plaintiff should not be permitted to circumvent the statute of limitations by categorizing an action as one for a declaratory judgment (Keith



v New York State Teacher's Retirement System, 46 AD 2d 938).

In the present case, the relief sought is for a declaratory judgment permitting the plaintiff to inspect and audit the hospital's books. The coercive relief sought would be a judgment directing an audit (see *Victrosen v Kaplan*, 75 Misc 2d, affd 44 AD 2d 702). Such an action would be equitable in nature and the six year statute of limitations would normally apply.

An action based on actual fraud, however, is governed by subdivision (8) of CPLR 213 regardless of whether the remedy is at law or equity (*Quadrozzi Concrete Corp v Mastroianni*, supra). Therefore, if it is determined that the underlying cause of action for an audit is based on actual fraud, subdivision (8) would





apply even though an equitable remedy is sought.

Although the third cause of action incorporates allegations of misconduct and conflict of interest, the theory upon which the cause of action rests is an implied condition in the sublease, as stated in the complaint and the plaintiff's memorandum of law.

The third cause of action is in substance an action based on a breach of an implied condition (see *Stern v Dunlap*, 228 F 2d 939), not fraud. The six year statute of limitations therefore applies (CPLR 213 subd [1]).

The first and third causes of action are therefore barred by the statute of limitations. The second cause of action may be barred by the six year statute but the plaintiff must be afforded an opportunity to establish



that the facts require an application of the accrual provision.

Turning next to the question of status, the defendants contend that Robert Cohen lacks standing to bring a derivative suit as a limited partner in SCR and SCREAM pursuant to section 115-a of the Partnership Law.

Section 115-a provides that an action may be brought in the right of a limited partner to procure a judgment in its favor if "in any such action, it shall be made to appear that at least one plaintiff is such a limited partner, \* \* \* at the time of bringing the action, and that he was such at the time of the transaction of which he complains \* \* \*".

The defendants maintain that Robert Cohen cannot assert that he is a general partner and at the same time attempt to sue derivatively as a limited



partner in SCREAM. The defendants correctly observe that the complaint states that "at all relevant times herein, plaintiff Robert Cohen was and still is a general partner in SCREAM" and that this allegation is reiterated throughout the complaint even in those causes of action which are brought pursuant to section 115-a.

In a motion for summary judgment as well as a motion to dismiss a complaint, the moving party must submit proof in support of his claim. In the present case, the defendants seek to dismiss on the ground of incapacity because Robert Cohen alleges that he is a general partner. They do not seek to dismiss on the ground that Robert Cohen is not in fact a general partner. Indeed, the defendants, in their answer, deny that the plaintiff is a general partner.



The defendants cannot purport to concede that Robert Cohen is a general partner "for the purpose of this motion" without conceding the point for all purposes.

In substance the defendants' motion to dismiss is based on a claim that there is a failure to state a cause of action.

On a motion to dismiss, when evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that a significant dispute exists regarding it, dismissal should not eventuate (*Guggenheimer v Ginzburg*, 43 NY 2d 268).





Where a pleading is attacked for alleged inadequacy in its statements, the court's inquiry should be limited to whether it states in some recognizable form any cause of action known to our law (*Foley v D'Agostino*, 21 AD 2d 60). A pleading is deemed to allege whatever can be implied from its statements (*Town of Ogden v Howarth & Sons*, 58 Misc 2d 213).

In the present case, a reasonable interpretation of the complaint is that Robert Cohen alleges that he is a general partner and in the alternative that he is a limited partner. If his status as a general partner is not sustained he seeks to bring an action on behalf of the partnership as a limited partner.

If it is determined that Robert Cohen was a limited partner in SCREAM at the time of the allegedly



fraudulent acts which are the subject of this proceeding, he has standing to institute a derivative action and a class action on behalf of the limited partners provided that the requirements of §115-a are met.

A derivative suit is in effect an action against the general partners for wrongfully refusing to sue as well as the third party who is allegedly liable to the partnership. Limited partners are authorized to sue on behalf of the partnership entity to enforce a partnership claim when those in control of the business wrongfully refuse to do so (*Riviera Congress Assn v Yassky*, 18 NY 2d 540).

Where it is alleged that the general partners will not institute an action because of their own self-dealings, the limited partners should be



permitted to bring an action (Riviera Congress Assn v Yassky, supra).

Therefore, the motion to dismiss the seventh, eighth, ninth, tenth and eleventh causes of action on the grounds that the plaintiff lacks standing as a limited partner should be denied.

With respect to SCR alone, the defendants contend that the plaintiff did not have standing in 1971 to bring a derivative suit as a limited partner since the partnership was dissolved on November 15, 1970. The basis of this contention is the provision in section 115-a which requires that the plaintiff be a limited partner at the time of the suit (Partnership Law, §115-a subd [b]).

The plaintiff in his original complaint states that the partnership was dissolved as of the dates of Simon Cohen's death and was never



reconstituted. This was not alleged in the amended complaint.

On dissolution, the partnership is not terminated but continues until the winding up of the partnership affairs is completed (Partnership Law, §61). The only manner in which a partnership can be wound up is through an accounting (Ben-Dashan v Plitt, 58 AD 2d 244). The remaining partners of a dissolved partnership are still carrying on the business as partners. They can be sued in the partnership name (Matter of Luckenbach, 45 Misc 2d 897) and may enforce a partnership claim. Indeed, the defendant Werner previously brought an article 78 proceeding in the Supreme Court, Nassau County, against the Commissioner of Social Services and on behalf of M-I-H. The limited partnership which had been formed to





operate the hospital was no longer in existence at the time of the lawsuit. Nevertheless, the court held that the petitioner, as a liquidating partner, had standing to bring an action (Matter of Mid-Island Hospital v Wyman, 27 AD 2d 866).

Even if the court were to determine as a matter of law that the partnership was dissolved as of November 1970, any rights which the plaintiff may have to bring a derivative suit did not terminate solely because of the death of Simon Cohen.

This would apply to a class action against a partner on behalf of the limited partners as well. The dissolution of the partnership does not discharge the existing liability of a partner (Partnership Law, §67).

The motion to dismiss the fourth, fifth, sixth and twelfth causes



of action on the grounds that the plaintiff has no standing as a limited partner of SCR should therefore be denied.

The defendants contend that to the extent the first, second, third, fourth, fifth, sixth, seventh, ninth and tenth causes of action against Hackell, Potter, Citibank and Weiner/M-I-H are brought pursuant to §115-a of the Partnership Law, the plaintiff is barred as to any transactions occurring before August 6, 1971, three years prior to the amended complaint. This contention is based on an application of CPLR 214.

CLPR 214 provides that an action to recover upon a liability, penalty or forfeiture created by statute (except as provided in sections 213 and 215) must be commenced within three years (CPLR 214 subd [2]).



In the present case, the statute in question does not provide for any new claims. It merely provides standing to the limited partners to enforce a claim.

The purpose of §115-a was to codify the rule already established by decisional law that a limited partner may bring a derivative action in the right of a limited partnership to procure a judgment in its favor (Note, L 1968, ch 496).

Where a statute does not create a new claim but merely provides standing CPLR 214 does not apply (State of N.Y. v Cortelle Corp, 38 NY 2d 83).

CPLR 214 has no application whatsoever to the fifth, sixth, seventh, ninth and tenth causes of action.

Additional questions are raised in connection with Robert Cohen's standing to sue the defendants Simon



Cohen and the executors of the estate of Simon Cohen in a class action for breach of trust, individually or on behalf of the limited partners of SCR and SCREAM.

A limited partner does not individually have a cause of action to recover the loss of his partnership investment resulting from the acts of a general partner (*Blattberg v Weiss*, 61 Misc 2d 564).

However, a general or managing partner of a limited partnership is bound in a fiduciary relationship with the limited partners (*Meinhard v Salmon*, 249 NY 458) and limited partners may bring a class action on behalf of all limited partners where the subject of the action is of common interest (*Lichtyger v Franchard Corp*, 18 NY 2d 528; CPLR 901).

In the present case, there are allegations of fraud, conspiracy, breach





of trust, waste and mismanagement which resulted in the loss of investment and profits. There are questions of common interest to the limited partners (Alpert v Haimes, 64 Misc 2d 608) and are actionable whether or not the recovery for each partner may be different in amount (Ray v Marine Midland Grace Trust, 35 NY 2d 147).

The defendants contend that a class action cannot be maintained because the plaintiff has failed to comply with CPLR 602, which requires that within 60 days after the time to serve a responsive pleading to an action brought as a class action, the plaintiff must move for an order to determine whether it is to be so maintained.

The 60 day requirement is not construed as a statute of limitations (2 Weinstein-Korn-Miller, NY Civ Prac, par 902.02).



In any event, CPLR 902 became effective on September 1, 1975, four years after this action was commenced and subsequent to the time that the amended and supplemental complaint was filed.

While procedural changes are, in the absence of words of exclusion, deemed applicable to subsequent proceedings in pending actions, it takes a clear expression of the legislative purpose to justify a retrospective application of even a procedural statute so as to effect proceedings previously taken in such actions (*Simonson v International Bank*, 14 NY 2d 281). Therefore, the statute would not operate by relation back to invalidate the cause of action because of a failure to move for an order within the 60 day period.

Furthermore, it is noted that with respect to SCREAM, a determination



as to whether the action may proceed as a class action cannot be made until such time as Robert Cohen's individual status as a general or limited partner is resolved.

The defendants further contend that the thirteenth, fourteenth and fifteenth cause of action for an accounting should be dismissed on the ground that they fail to state a cause of action. The defendants assert by way of counterclaim that Robert Cohen wrongfully refused to acknowledge an amendment to the Articles of Partnership of the Simon Cohen Company (hereinafter SCC) which includes Reed as a general partner. It is contended that following the death of Robert Cohen, Reed was designated as a general partner pursuant to the original Articles of Partnership.

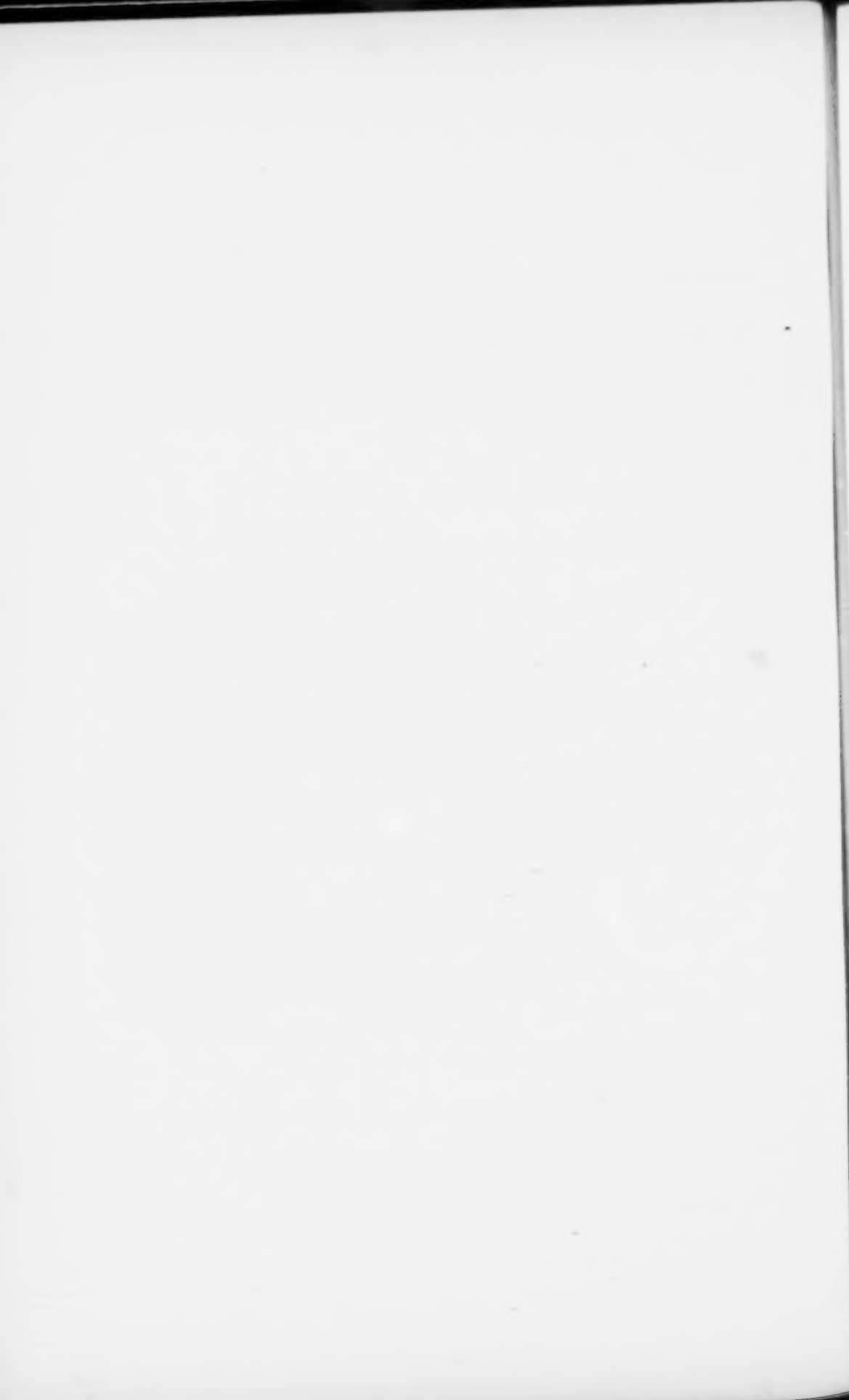


In the motion to dismiss, however, the defendants aver that Robert Cohen, as a general partner, cannot sue Reed as a limited partner for breach of trust.

Robert Cohen alleges that he was at times a limited partner and at other times a general partner.

Regardless of Reed's status as a general or limited partner Robert Cohen has standing to bring an action for an accounting provided the statutory requirements are satisfied (Partnership Law, §44). Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners, from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property (Partnership Law, §43).





Paragraph "33" of the complaint states that the "first through sixteenth causes of action are brought pursuant to section 115-a of the Partnership Law".

Robert Cohen, as a general partner of SCC, cannot bring a class action as a general partner for breach of trust. Section 115-a has no application here since it applies to derivative suits. However since the complaint states that the thirteenth, fourteenth and fifteenth causes of action for an accounting are brought on behalf of Robert Cohen, individually and as a general partner of SCC, it cannot be said that there is a failure to state a cause of action since Robert Cohen as a general or limited partner is entitled to an accounting.

The defendants raise the defense of laches. This defense



applies only to bar a remedy which is purely equitable. There must be an inexcusable delay and an irreversible detriment to the defendants (Reynolds v Snow, 10 AD 2d 101, affd 8 NY 2d 899). Mere delay will not bar the remedy (Schwartz v Marien, 40 AD 2d 1078).

In the present case, the equitable causes of action are for an accounting, breach of trust and reformation of contract.

Where a plaintiff fails to enforce his remedy to the detriment of the other party, a court of equity may refuse to grant relief even if the statute of limitations is not applicable.

This principle applies to a plaintiff who sues for an accounting. However, as in the case of the application of the statute of limitations to an action based on fraud,



laches on the part of one defrauded cannot arise until he knows of the fraud (Seligson v Weiss, 222 AD 634, 36 NY Jur §158).

Laches would bar the remedy of a partner for an accounting where the plaintiff was either aware of the facts complained of before instituting the action or had access to the relevant information (M & C Creditors Corp v Pratt, 172 Misc 695, affd 255 AD 838, affd 281 NY 804).

In the present case, however, the knowledge which may be attributed to the plaintiff is a question which cannot be disposed of on a motion to dismiss.

The same principles apply to the causes of action for reformation and breach of trust.

The defendants contend that the plaintiff has failed to meet the pleading requirements set forth in



subdivision (b) of CPLR 3016 for fraud and breach of trust, which are alleged to be more stringent than the requirement of CLPR 3013.

The sufficiency of a pleading statement primarily depends upon compliance with section 3013's basic requirements. The special provisions in subdivision (b) of CPLR 3016 constitute no more than a directive that the transaction and occurrences constituting the wrong shall be pleaded with sufficient detail to give adequate notice thereof (Foley v D'Agostino, supra; Hewitt v Maass, 41 Misc 2d 894).

In the present case, the second cause of action and the causes of action numbered "four through fifteen" embrace a forbidden type of deception set forth with sufficient factual specificity so as to identify the transaction and indicate the theory of





redress to enable the court to control the matter and for the adversary to prepare (Guggenheimer v Ginzburg, supra). The sixteenth cause of action for waste and mismanagement is likewise sufficient.

The defendants have demonstrated by their detailed objections that the theories upon which the plaintiff relies are apparent to them. They have acknowledged a recognition of the material elements of the complaint (Hewitt v Maass, supra).

The defendant's contention that the complaint is supported only by conclusory statements rather than facts is without basis.

The defendants have submitted affidavits in support of their motion for summary judgment denying any complicity in a scheme to defraud. They contend that the plaintiff has failed to



come forward with proof sufficient to defeat the motion for summary judgment.

Where there is a motion for summary judgment, the opposing party must come forward with proof to establish a genuine issue of fact (Mallad Construction Corp v County Fed Sav & Loan Assn, 32 NY 2d 285) but this is only where the affidavits in support of the motion have established that there is a right to judgment as a matter of law (Greenberg v Manlon Realty, 43 A D 2d 968).

The defendants have failed to establish that as a matter of law they are entitled to a judgment. Indeed, the extensive affidavits submitted by the defendants make it apparent that there are disputes between the parties with respect to ultimate facts (NY Telephone Co v Telesystems Corp, 27 AD 2d 866).



The referee concludes that as to each cause of action (with the exception of the first and third causes of action) there are issues which cannot be resolved on a motion for summary judgment.

Accordingly, I recommend that the motion for an order granting summary judgment be denied and the motion for an order dismissing the first and third causes of action be granted and the motion for an order dismissing each of the remaining causes of action be denied.

Dated: August 22, 1979.

Respectfully submitted,

/s/ \_\_\_\_\_  
C. RAYMOND RADIGAN,  
Referee



SURROGATE'S COURT:  
COUNTY OF NASSAU

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ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty: DECISION  
Co., suing on behalf of  
himself and all other : File No. 148704  
partners, both general Dec. No. 192  
and limited, and in the: 193  
right and on behalf of 194  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B. F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :





COHEN REAL ESTATE &  
 MANAGEMENT CO., SIMON :  
 COHEN REALTY CO., and  
 ALJER CO., :

Defendants. :

-----X

This complex litigation initially started in the Supreme Court and was transferred here on this court's procedural consent (see Matter of Suchoff, 55 Misc 2d 284). Years of pretrial disclosure have now been completed. The Chief Clerk of this court was appointed on consent of all parties to hear and report on a lengthy motion for summary judgment.

Before the court are three motions to overrule the Referee's Report dated August 22, 1979 which recommended that the defendants' motion for summary judgment with respect to the first and third causes of action in the amended and supplemental complaint be granted and with respect to the remaining causes



of action recommended that the defendants' motion for summary judgment and for an order dismissing each cause of action be denied.

The defendants contend that the Referee erred in denying summary judgment with respect to the 15 remaining causes of action on the grounds that the rules of law pertaining to summary judgment were misconstrued and misapplied by the Referee. In particular, the defendants contend that the Referee has misapplied the principles set forth in *Greenberg v Manlon Realty, Inc.* (43 AD2d 968) by shifting the burden of proof to the defendants to show that they were entitled to judgment as a matter of law before the plaintiff was required "to come forward with evidentiary facts in support of his complaint."



In the present case, the defendants' motion for summary judgment was held in abeyance pending discovery. Following the completion of discovery the plaintiff submitted supplemental affidavits in support of his objection to the motion for summary judgment.

In *Greenberg v Manlon Realty, Inc.* (supra) the Court stated at page 969: "On a motion for summary judgment, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law; anything less requires a denial of the motion, even where the opposing papers are insufficient." It is the moving party, plaintiff or defendant, who has the burden of showing that his motion for summary judgment should be granted. To obtain summary judgment it is necessary that the movant establish his action or



defense sufficiently to warrant the court as a matter of law in directing summary judgment (Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 NY2d 1065);

General conclusory allegations which contain no specific factual references cannot defeat a motion for summary judgment where the movant's papers make out a prima facie case for the grant of the motion (Bank of New York v Progressive Phone Systems, Inc., \_\_\_\_\_ AD2d \_\_\_\_\_, NYLJ 10/4/79, p 12).

However, to the extent that the defendants failed to establish that they were entitled to judgment as a matter of law, the plaintiff was not required to offer additional proof to defeat the motion for summary judgment.

Taking all the affidavits submitted to this court into consideration, the defendants failed to





show that their motion for summary judgment should be granted. Far from dispelling any conflicts of fact, the affidavits submitted by the plaintiff and defendants crystallized the issues of fact and credibility which await resolution.

The cases cited by the defendants do not undermine the conclusion reached by the Referee. In *Connell v St. Mary's Hosp. of Troy* (45 NY2d 944), a case cited by the defendants, the Court granted the defendants' motion for summary judgment on the ground that the defendant had established as a matter of law that the plaintiff's cause of action under the insurance policy upon which the complaint was based had terminated and the plaintiff failed to show any issues of fact.



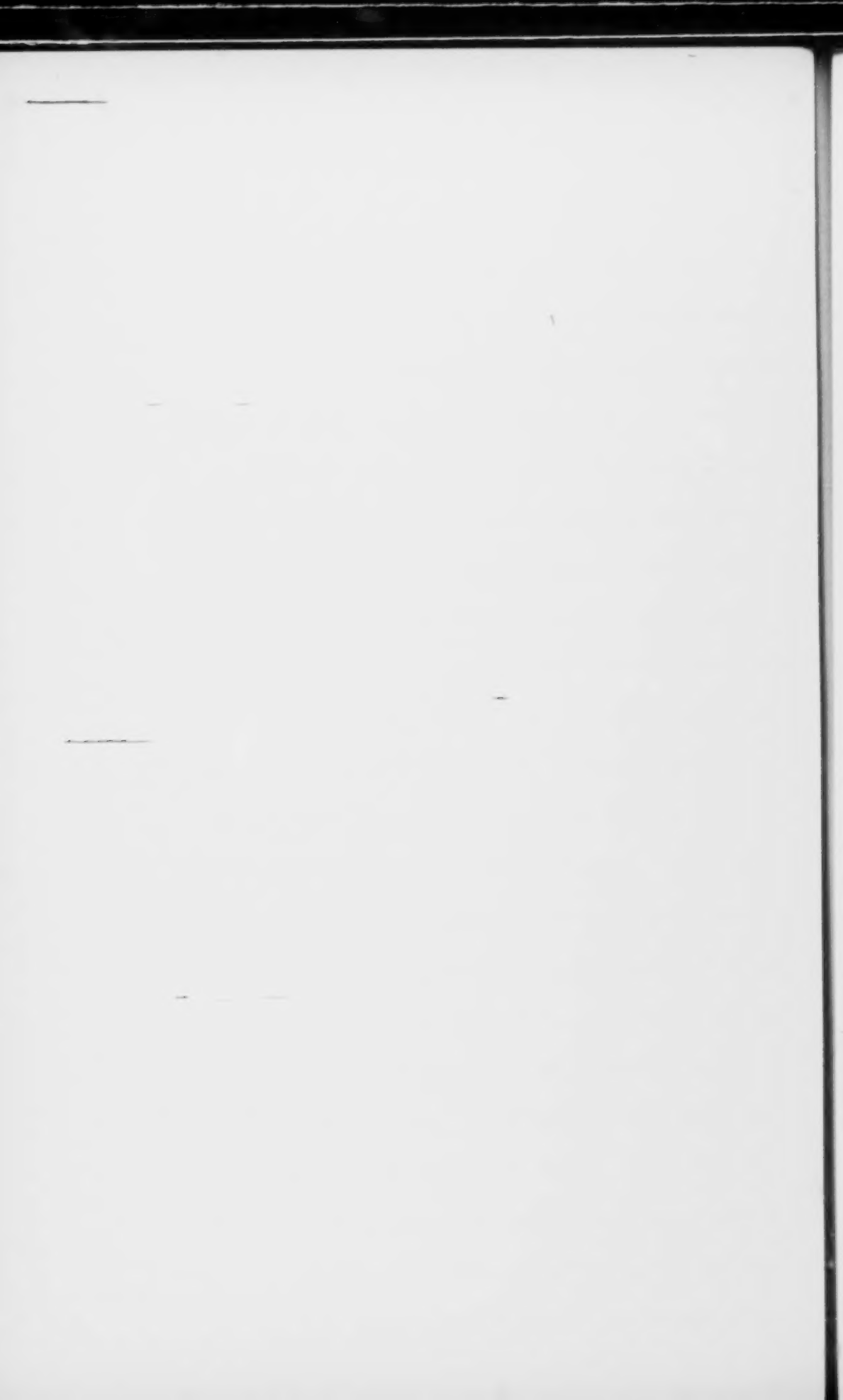
Additional cases cited by the defendants including Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., supra; Apache-Beals Corp v International Adjusters (46 NY2d 888); Fried v Bower & Gardner (46 NY2d 765) hold that evidentiary facts and not conclusory allegations are required to defeat a motion for summary judgment. In the present case the plaintiff satisfied this requirement.

The defendants contend that the statute of limitations is a bar to the fourth, fifth and sixth causes of action in the amended and supplemental complaint on the ground that Robert Reed, William Werner and the executors of the estate of Simon Cohen were not included in the original complaint as defendants with respect to the allegations made in these causes of action. The fourth, fifth and sixth



causes of action concern an alleged scheme to defraud the partners of the Simon Cohen Realty Company.

Paragraph "56" of the original complaint states: "The said ROBERT J. REED has wrongfully, improperly and negligently approved, ratified, acquiesced, permitted and paid out of the treasury and funds of the said Realty Company to SIMON COHEN during his lifetime and/or to the Estate of SIMON COHEN after the death of the decedent, the sum of \$133,784.69 as overpayments" in connection with the Simon Cohen Realty Company. The seventh cause of action in the original complaint names the executors of the estate as defendants and states that the estate is liable for funds due and owing to the Simon Cohen Realty Company. The eighth cause of action in the original complaint is against William Werner in



connection with funds allegedly diverted from the company.

There is a relation back of a pleading where the earlier pleading gives an adverse party sufficient notice of the transaction from which the claim arises (*Cerrato v R. H. Crown Co.*, 58 AD2d 721; CPLR 203 subd. [e]). This requirement was satisfied with respect to the fourth, fifth and sixth causes of action in the amended and supplemental complaint with respect to William Werner, Robert Reed and the executors of the estate of Simon Cohen.

With respect to the ninth and tenth causes of action the executors of the estate of Simon Cohen were added as defendants in 1974 in connection with the alleged siphoning of funds due and owing to the Simon Cohen Real Estate and Management Company from the Mid-Island Hospital.





Since neither Simon Cohen nor the estate of Simon Cohen was included in the original complaint with respect to this alleged scheme, the ninth and tenth causes of action would not relate back to the executors of the estate. The defendants contend that it is clear that the plaintiff knew or should have known of Simon Cohen's complicity in 1971 when the original complaint was served. They conclude that the two-year accrual provision in CPLR 203 subd. [f] does not extend the time for pleading these causes of action to 1974 when the amended and supplemental complaint was served and that the ninth and tenth causes of action are barred by the six-year statute of limitations to the extent that the executors of the estate are defendants.

The purpose of allowing time for discovery proceedings was to permit



both parties to cull facts in support of their respective positions. Whether the plaintiff knew or should have known in 1971, prior to the completion of discovery, that the decedent was involved in a conspiracy to defraud the Simon Cohen Realty Company is a conclusion of fact which awaits determination.

The Referee stated that the two-year accrual provision of CPLR 213 subd. [8] and 203 subd. [f] with respect to the fifth and sixth causes of action could not be used to sustain the allegations of fraud against the defendants Hackell, Potter and First National City Bank individually for acts of fraud which occurred prior to August 1968 but that since an issue of fact exists as to precisely when each of the acts complained of occurred, the motion for summary judgment could not be



granted. The same principle applies to the allegations against the executors of the estate of Simon Cohen in the ninth and tenth causes of action. The question of which transactions are barred by the statute of limitations remains open.

With respect to the partnership status of Robert Cohen in the Simon Cohen Real Estate and Management Company, the defendants contend that the ninth and tenth causes of action should be dismissed to the extent that they apply to events which occurred prior to May 1970 insofar as they are brought under section 115-a of the Partnership Law.

In this complaint the plaintiff states that he was at all times a general partner of Simon Cohen Real Estate & Management Company. However, some of his causes of action



are on behalf of both the limited and general partners of Simon Cohen Real Estate & Management Company. The plaintiff asserts in his memorandum of law, that prior to May 1970 the plaintiff was a general partner in the company but that subsequent to May 1970 he may have become a limited partner by reason of the fact that he submitted a paper purporting to be his resignation as a general partner. Even assuming that the plaintiff was a general partner prior to May 1970, the ninth and tenth causes of action could not be dismissed on the grounds set forth. That part of each of the causes of action which rest on plaintiff's status as a limited partner cannot be dismissed with respect to events occurring prior to 1970 where the dates of the fraudulent transactions alleged to have occurred have not been established.





The defendants seek a dismissal of the 13th, 14th and 15th causes of action insofar as they are brought under §115-a. The defendants state that "There is no suggestion or argument anywhere in the course of this long litigation that plaintiff was ever a limited partner of the Simon Cohen Company." However, Robert Reed, Sidney Hackell, Beatrice Potter and First National City Bank in their answer deny the allegations set forth in paragraph "1" of the amended and supplemental complaint which states that the plaintiff is a general partner in the Simon Cohen Company and William Werner denied knowledge sufficient to form a belief as to the allegation. Furthermore, with respect to the Simon Cohen Company, the plaintiff merely seeks an accounting, to which he is



entitled whether he is a general or limited partner.

With respect to the Simon Cohen Realty Company, the plaintiff claims in his original complaint that the company was terminated by the death of Simon Cohen pursuant to a partnership agreement. The defendants claim that subsequent to his death the parties continued to be associated as a joint venture. They contend that the plaintiff lost his status to bring the action under §115-a of the Partnership Law by reason of the fact that the partnership no longer existed at Simon Cohen's death. Section 115-a of the Partnership Law requires that a partner bringing an action on behalf of the limited partners has status as a limited partner at the time he brings his cause of action. The question as to whether the partnership was terminated or



reconstituted as a joint venture or otherwise is a question of fact and law which awaits determination.

The dissolution of a partnership does not affect the rights of the limited partners to sue derivatively (*Klebanow v New York Produce Exchange*, 344 F2d 294). Furthermore, the argument that the original partnership was converted into a joint venture without dissolution cannot be employed by third parties or former partners to shield themselves from liability for fraud.

Accordingly, the recommendations of the Referee are confirmed.

In the order to be settled as hereinafter provided, the parties should advise the Court if they consent to have the Referee hear and report on the issues of this litigation or if they



wish the Surrogate to try the case and the order should provide for a trial date and said date will depend on whether the Surrogate or Referee is to conduct the trial. An earlier date will be assigned if the Referee is to conduct same because while the Surrogate's Court is up to date and early trials and hearings can be obtained in this court, the Surrogate's calendar is complete for several months due to active litigation in several matters before the Court and he has additional assignments as Acting Supreme Court Judge.

Settle order on five days' notice with three additional days if service is made by mail.

Dated: November 28, 1979.

JOHN D. BENNETT  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

In the Matter of the	:	<u>DECISION</u>
Judicial Settlement		
of the Intermediate	:	File No. 148704
Account of Proceedings	:	Dec. No. 314
of BEATRICE POTTER,	:	
ROBERT J. REED, SIDNEY	:	
HACKELL and FIRST	:	
NATIONAL CITY BANK,	:	
as Executors of the	:	
Estate of	:	
	:	
SIMON COHEN,	:	
	:	
Deceased.	:	

-----X

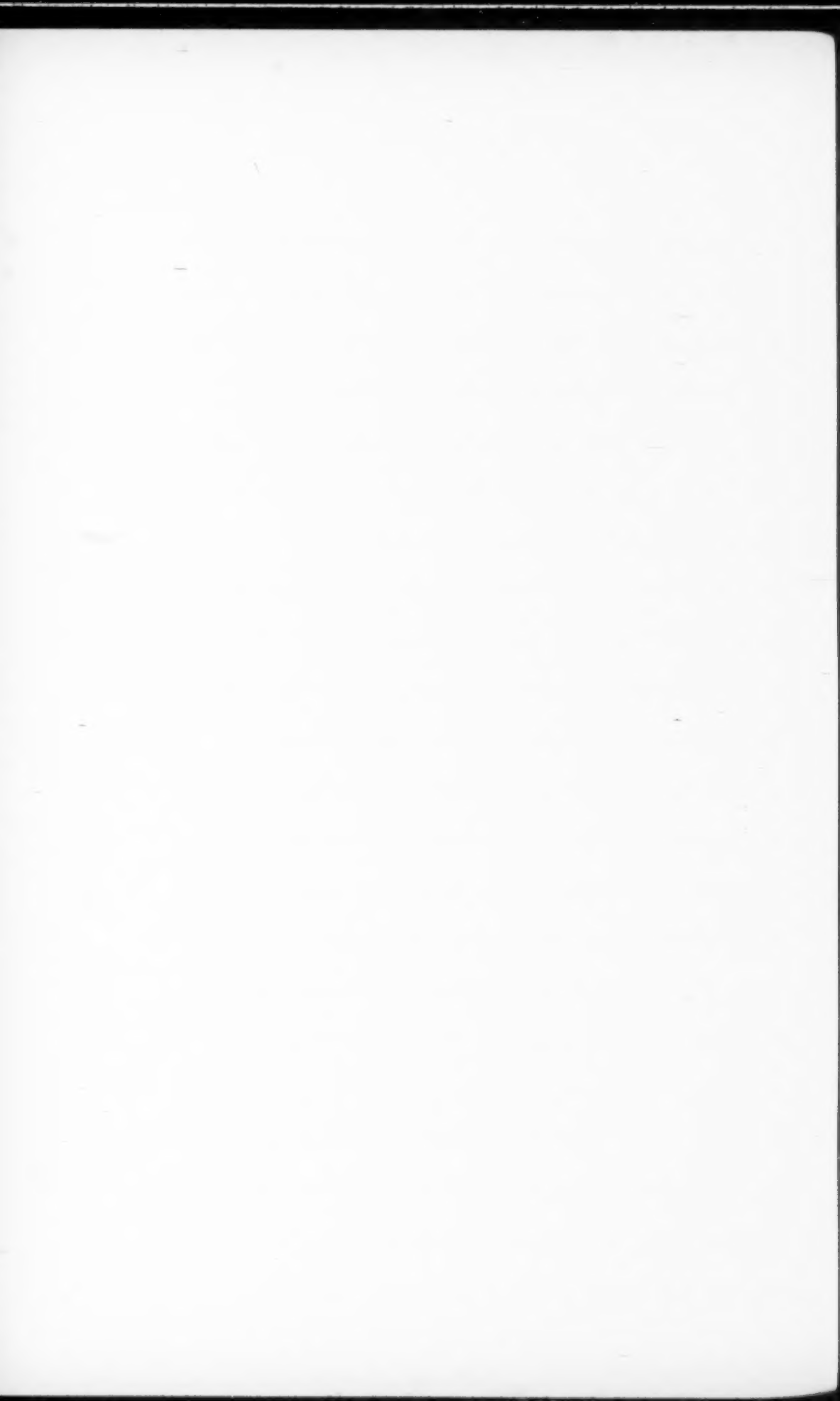
In these accounting proceedings the guardian ad litem moves to have the fiduciaries file a new complete accounting for the period from the date of Deceased's death down to and including August 10, 1977, the date of death of Deceased's widow, a Trust beneficiary under Deceased's Will. It is his contention that the intermediate accounting for the period November 25, 1970 to October 31, 1973 now filed is not in proper form in that this estate



includes trusts and it is necessary to have a breakdown of principal and income with assets, debts and claims allocated to each as well as other allocations.

The position of the guardian ad litem is well taken and the court directs that a full and complete accounting be filed. Any information supplied in the prior accounting which could have been the subject matter of a possible objection from respondents, other than the guardian ad litem, are precluded from offering any objections concerning same when the new accounting is filed, and this will eliminate one of the objections that the fiduciaries had to the relief sought by the guardian ad litem.

As to the time to file the new accounting, the court is mindful of the litigation presently pending in this court and the time that will be



necessary to prepare and try the issues. However, the fiduciaries should start preparing their accounting and be ready to file same within two months from the time that the testimony in the hearing is completed.

The guardian ad litem's motion to amend the above title is also granted.

Settle order on five days' notice with three additional days if service is made by mail.

Dated: December 18, 1979.

JOHN D. BENNETT  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner  
of Simon Cohen Real : DECISION  
Estate & Management  
Co., Simon Cohen Realty: File No. 148704  
Co., suing on behalf of  
himself and all other : Dec. 379  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B. F. WERNER, :  
Individually and doing  
business as Mid-Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :





COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

An order and counter-order have been submitted pursuant to the decision of this court dated November 28, 1979, and the court finds that the counter-order submitted by Mr. Fiorella covers the issues decided by the court and will be signed if found to be in proper form after there is added to the first ordering paragraph on page -7- after the word presiding "unless all parties consent to have the referee hear and report," and the second ordering paragraph on that page is changed so as to provide that the trial will commence on March 4, 1980.



A86

Proceed accordingly.

Dated: December 19, 1979

JOHN D. BENNETT  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:

COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty: :  
Co., suing on behalf of :  
himself and all other :  
partners, both general :  
and limited, and in the: :  
right and on behalf of :  
Simon Cohen Real Estate: :  
& Management Co., Simon :  
Cohen Realty Co., Simon: :  
Cohen Company, and :  
Aljer Realty Co., :

ORDER

File No.  
148704

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
Simon Cohen, deceased, :  
WILLIAM B. B. WERNER, :  
Individually and doing :  
business as Mid-Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.: :  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC., :  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

Defendants having moved by  
notices of motion dated September 6,  
1979, and September 11, 1979, for an  
order to reject the report of the  
Referee dated August 22, 1979, and the  
defendants having appeared by Messrs.  
Speno, Goldberg, Moore, MaRGULES &  
Corcoran, Robert W. Corcoran, Esq., of  
counsel, Albert J. Fiorella, Esq., and  
Messrs. Lubell and Koven, Murray Koven,  
Esq., of counsel, and the plaintiff  
having appeared in opposition thereto by  
Stephen Hochhauser, Esq., and due  
deliberation having been had thereon,  
and a memorandum decision having been  
rendered on November 28, 1979.

NOW THEREFORE, upon the  
aforesaid notices of motion, the

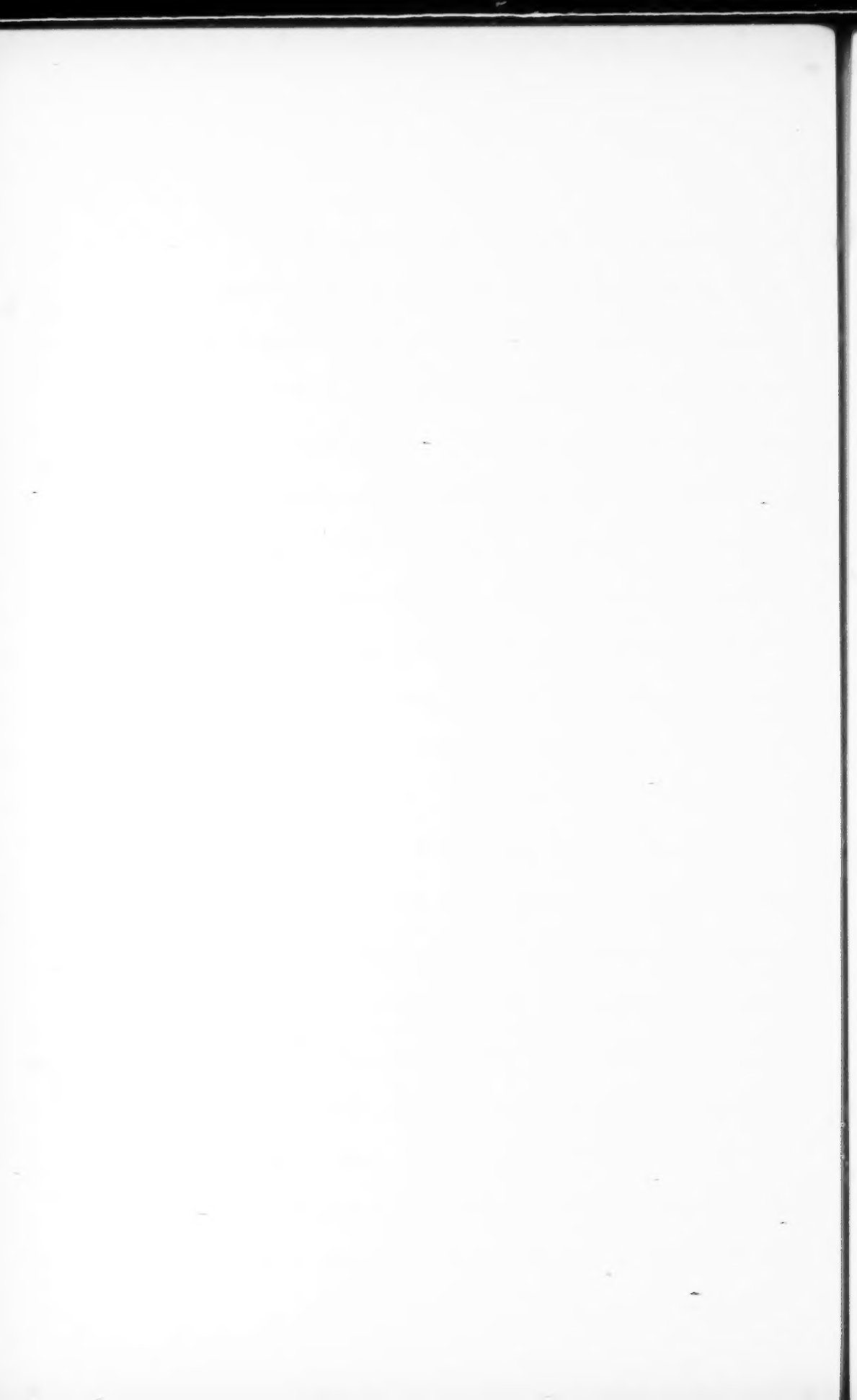




affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows:

(1) Original summons and complaint dated August 13, 1971, defendants' answer and counterclaim, dated December 22, 1971, plaintiff's reply, dated May 25, 1972;

(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;



(3) Depositions of Robert Reed, dated December 13, 1972, December 20, 1972, January 12, 1972, February 8, 1973, March 9, 1973, and March 29, 1973, together with plaintiff's Exhibits 1 through 49;

(4) Depositions of Mid-Island Hospital dated October 25, 1973, Beatrice Potter, dated October 25, 1973, Sidney Hackell, dated October 25, 1973, and First National City Bank by Henry McKenzie, dated October 25, 1973;

(5) The affidavit of Robert Reed, dated March 13, 1974;

(6) Plaintiff's supplemental summons and amended and supplemental complaint, dated July 24, 1974, defendant's answers filed June 12, 1975 (Feinerman), June 6, 1975 (Soto, et al.), October 18, 1974 (Executors et al.); plaintiff's reply, dated November 1, 1974;



(7) Transcript of testimony with defendants' Exhibits 1 through 6, on motion for summary judgment, dated February 25, 1975 and February 26, 1975;

(8) Depositions of Sidney Hackell, dated May 2, 1977, May 3, 1977, May 4, 1977, May 27, 1977, June 15, 1977, and October 4, 1977, with plaintiff's Exhibits 50 through 62;

(9) Depositions of Sheldon Katz and Volume Feeding, dated May 6, 1977 and November 17, 1977, with plaintiff's Exhibit 63;

(10) Depositions of Judah Feinerman and Jasdane, Inc., dated May 16, 1977 and October 25, 1977;

(11) Depositions of Juan Soto and J.S.K. Cleaning Services, Inc., dated May 9, 1977 and November 28, 1977, with plaintiff's Exhibits 64 and 65;

(12) Deposition of Brimsco, Inc., by Robert Reed, dated May 10,



1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2;—Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(15) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1978,



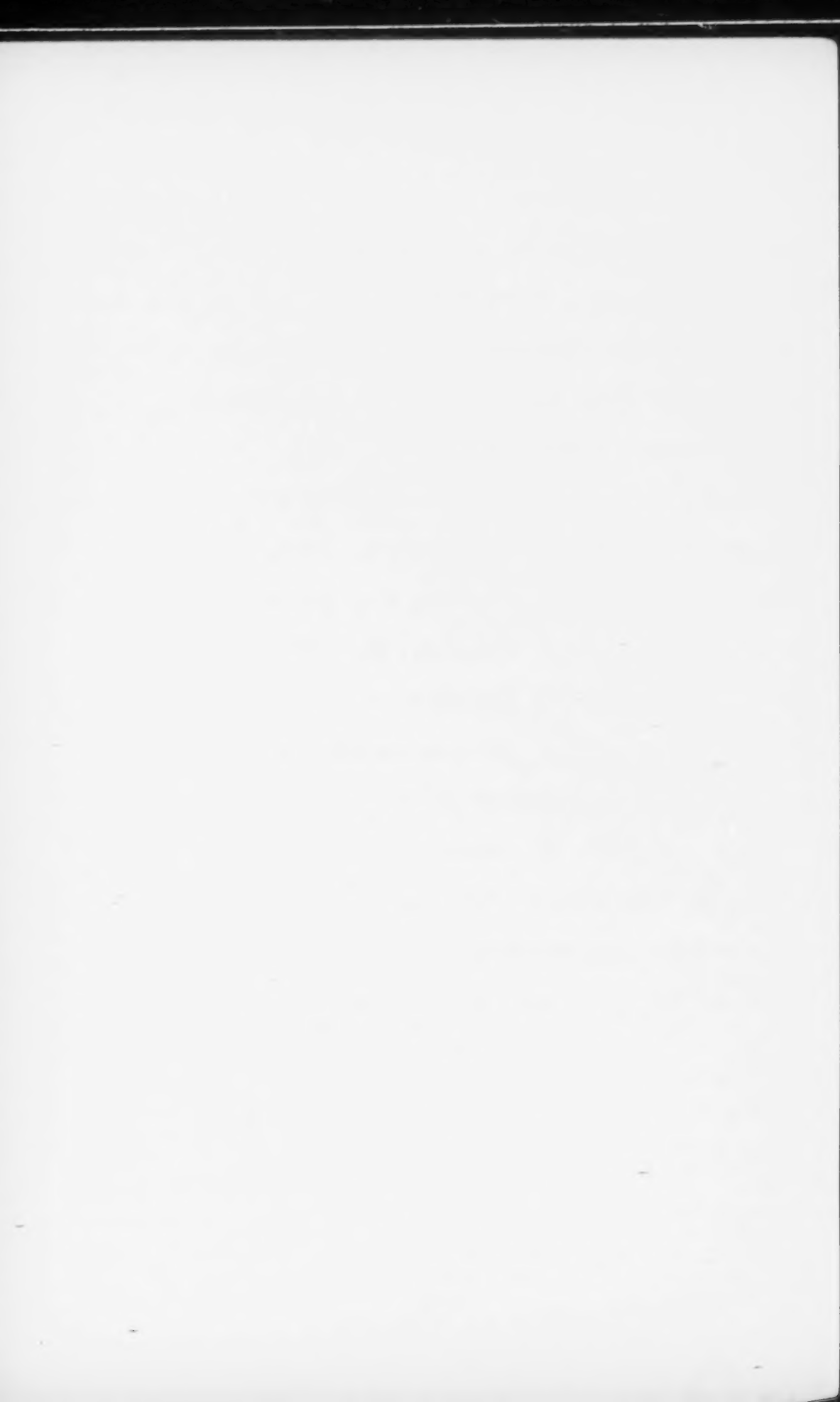


September 19, 1978, and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

(16) Depositions of Stephen Hochhauser, dated January 8, 1979, January 11, 1979, January 16, 1979, January 17, 1979, January 19, 1979, January 24, 1979, January 25, 1979, January 29, 1979, January 30, 1979, January 31, 1979, February 2, 1979, February 3, 1979, with defendant's Exhibits G-11 through I-15;

(17) Affidavits submitted and read on the motion for summary judgment with Exhibits annexed:

- (a) Sidney Hackell, dated December 31, 1976;
- (b) Robert Reed, dated December 31, 1976;
- (c) Leon Goodman, dated December 3, 1976;
- (d) William B.F. Werner, dated December 28, 1976;



- (e) Robert Cohen, dated  
September 26, 1975,  
December 29, 1975,  
March 14, 1979;
- (f) Arthur Press, dated  
May 12, 1979;
- (g) Bernd Bildstein,  
dated May 8, 1979;
- (h) Supplemental  
affidavit of  
Stephen Hochhauser,  
dated April 4, 1979;
- (i) Second supplemental  
affidavit of Robert  
Cohen, dated  
June 13, 1979;
- (j) Stephen Hochhauser,  
dated June 19, 1979;
- (k) Additional affidavit  
of Judah Feinerman,  
dated June 18, 1979;
- (l) Sidney Hackell,  
dated July 23, 1979;
- (m) Robert J. Reed,  
dated July 23, 1979;
- (n) Melvin Schneider,  
dated February 5,  
1979;
- (o) Harry Oster, dated  
June 29, 1979;



- (p) Beatrice Potter,  
dated July 23, 1979;
- (q) Albert J. Fiorella,  
dated July 23, 1979;
- (r) Sheldon Katz, dated  
July 23, 1979;
- (s) Jaun Soto, dated  
July 23, 1979;
- (t) Elaine Wilschek,  
dated July 23, 1979;
- (u) Howard S. Weisman,  
dated July 23, 1979;
- (v) Stephen Hochhauser,  
dated July 30, 1979;
- (w) Reply affidavit of  
Sidney Hackell,  
dated August 10,  
1979.

(18) The plaintiff's Bill of  
Particulars, dated September 3, 1975;

(19) Plaintiff's answers to  
defendant's Interrogatories, dated  
September 20, 1975;

(20) Plaintiff's amended and  
Supplemental Bill of Particulars, dated  
July 26, 1978;



(21) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

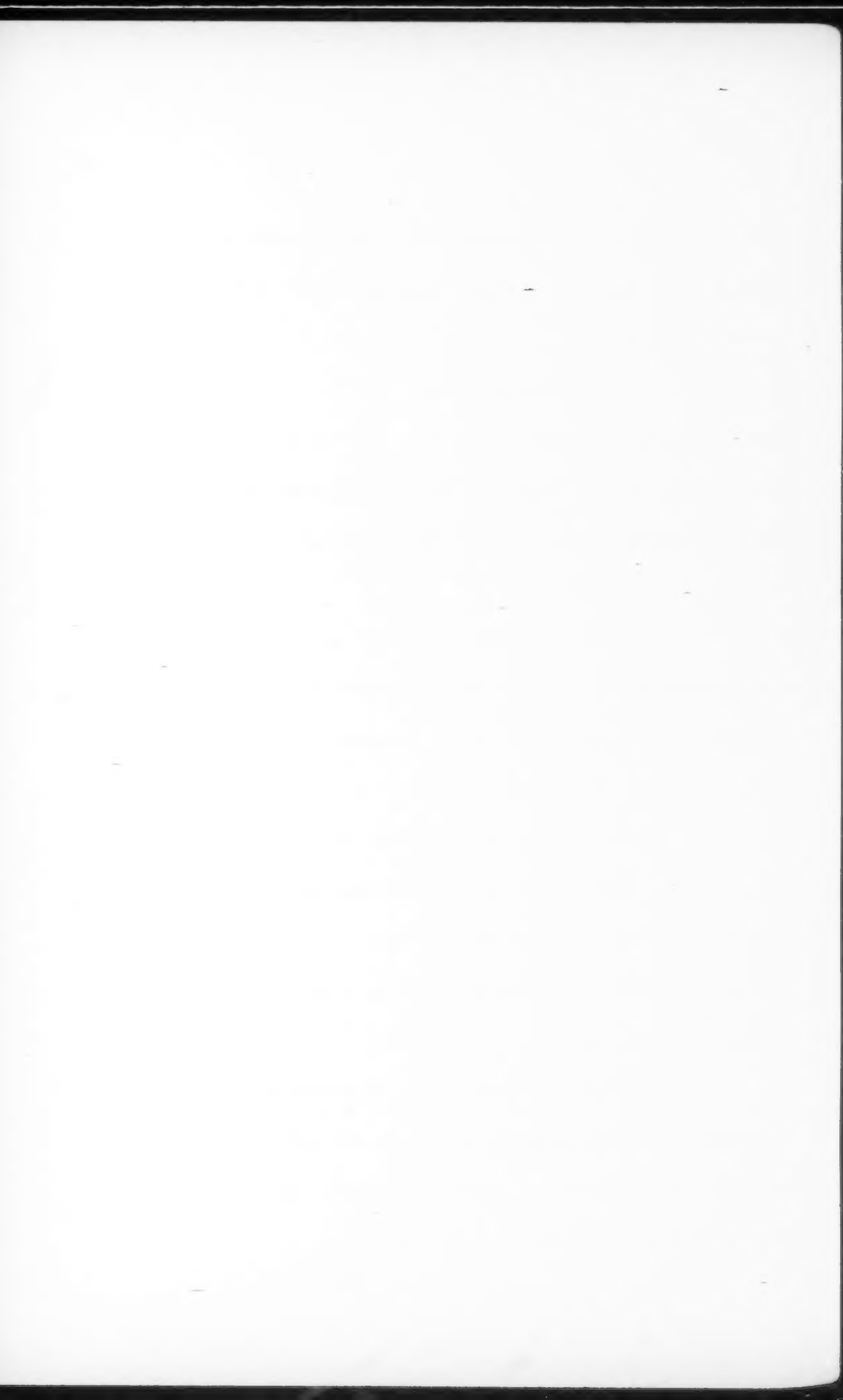
(22) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977;

(23) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

and upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied and it is further





ORDERED that the said  
Referee's Report be and the same is  
hereby confirmed in all respects, and it  
is further

ORDERED that the First and  
Third Causes of Action be and the same  
are hereby dismissed, and it is further

ORDERED that trial of the  
issues be had before the Judge presiding  
unless all parties consent to have the  
referee hear and report, and it is  
further

ORDERED that such trial shall  
commence on or after March 4, 1980.

/s/  
Surrogate

[ENTERED December 19, 1979.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty :  
Co., suing on behalf of :  
himself and all other :  
partners, both general :  
and limited, and in the :  
right and on behalf of :  
Simon Cohen Real Estate :  
& Management Co., Simon :  
Cohen Realty Co., Simon :  
Cohen Company, and :  
Aljer Realty Co., :

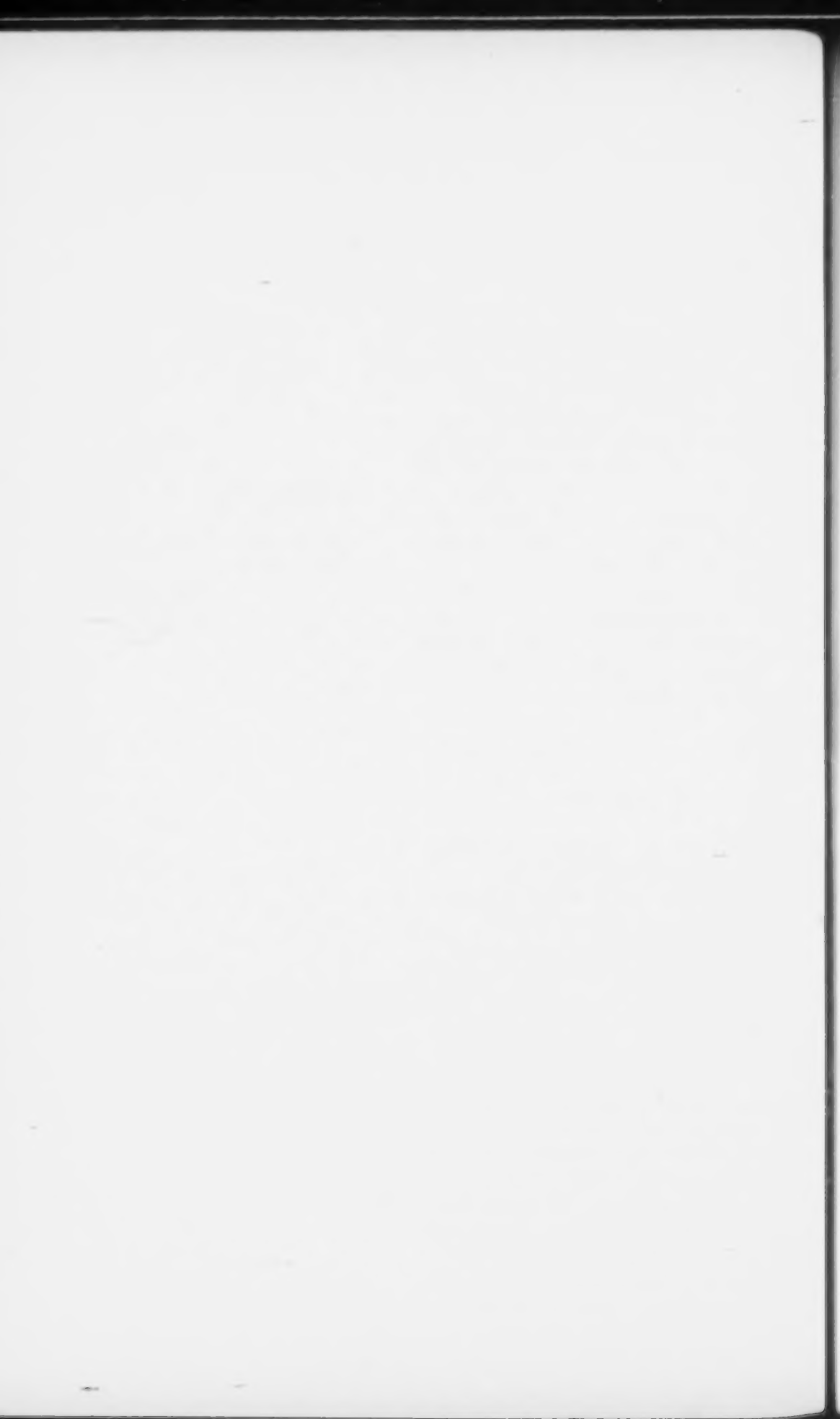
ORDER

File No.  
148704

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
Simon Cohen, deceased, :  
WILLIAM B. B. WERNER, :  
Individually and doing :  
business as Mid-Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC., :  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO.. and  
ALJER CO., :

Defendants. :  
-----X

Defendants having moved by  
notices of motion dated September 6,  
1979, and September 11, 1979, for an  
order to reject the report of the  
Referee dated August 22, 1979, and the  
defendants having appeared by Messrs.  
Speno, Goldberg, Moore, MARGULES &  
Corcoran, Robert W. Corcoran, Esq., of  
counsel, Albert J. Fiorella, Esq., and  
Messrs. Lubell and Koven, Murray Koven,  
Esq., of counsel, and the plaintiff  
having appeared in opposition thereto by  
Stephen Hochhauser, Esq., and due  
deliberation having been had thereon,  
and a memorandum decision having been  
rendered on November 28, 1979.

NOW THEREFORE, upon the  
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows;

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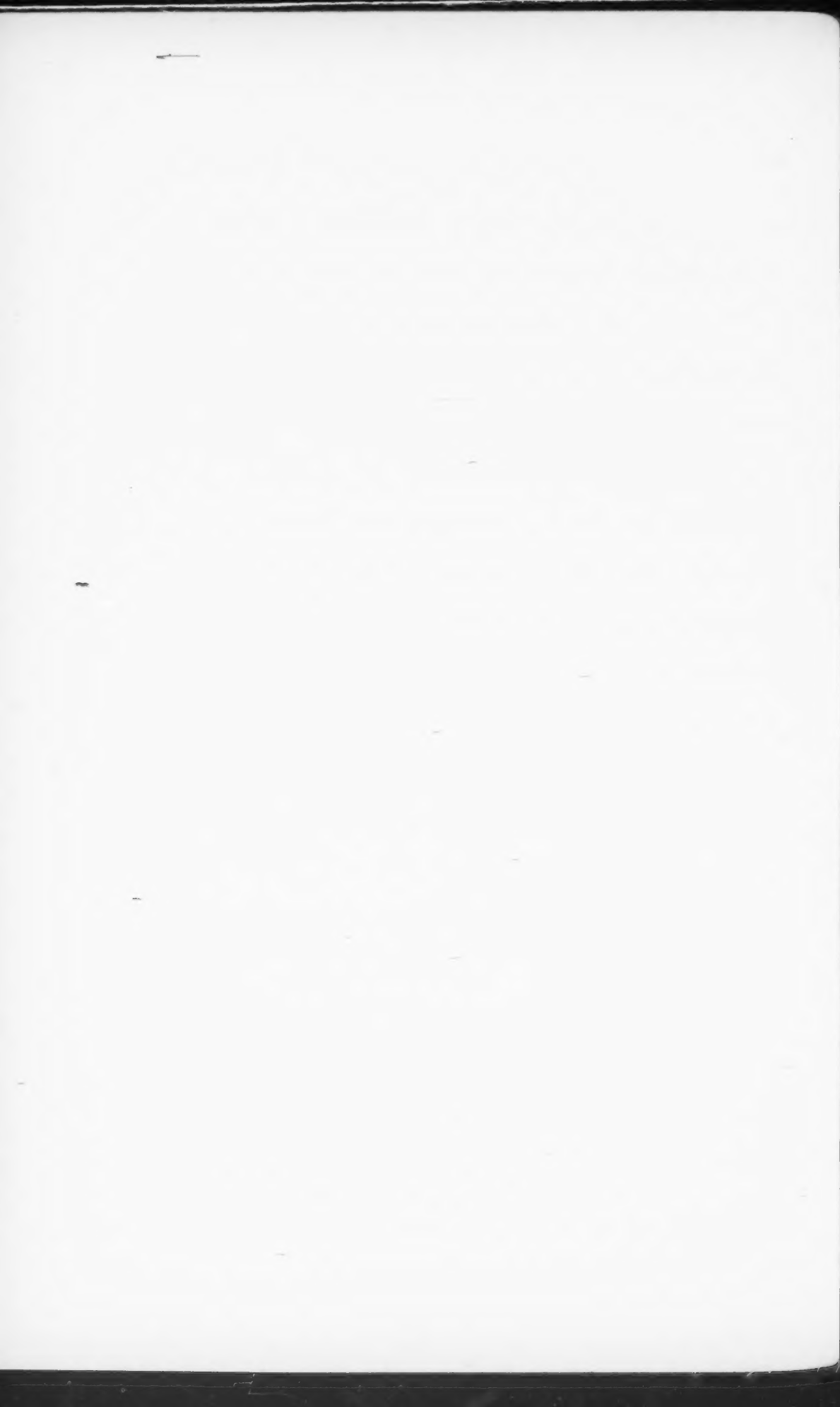
and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

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1976;
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- (c) Leon Goodman, dated  
December 3, 1976;
- (d) William B.F. Werner,  
dated December 28,  
1976;





- (e) Robert Cohen, dated  
September 26, 1975,  
December 29, 1975,  
March 14, 1979;
- (f) Arthur Press, dated  
May 12, 1979;
- (g) Bernd Bildstein,  
dated May 8, 1979;
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- (n) Melvin Schneider,  
dated February 5,  
1979;
- (o) Harry Oster, dated  
June 29, 1979;
- (p) Beatrice Potter,  
dated July 23, 1979;

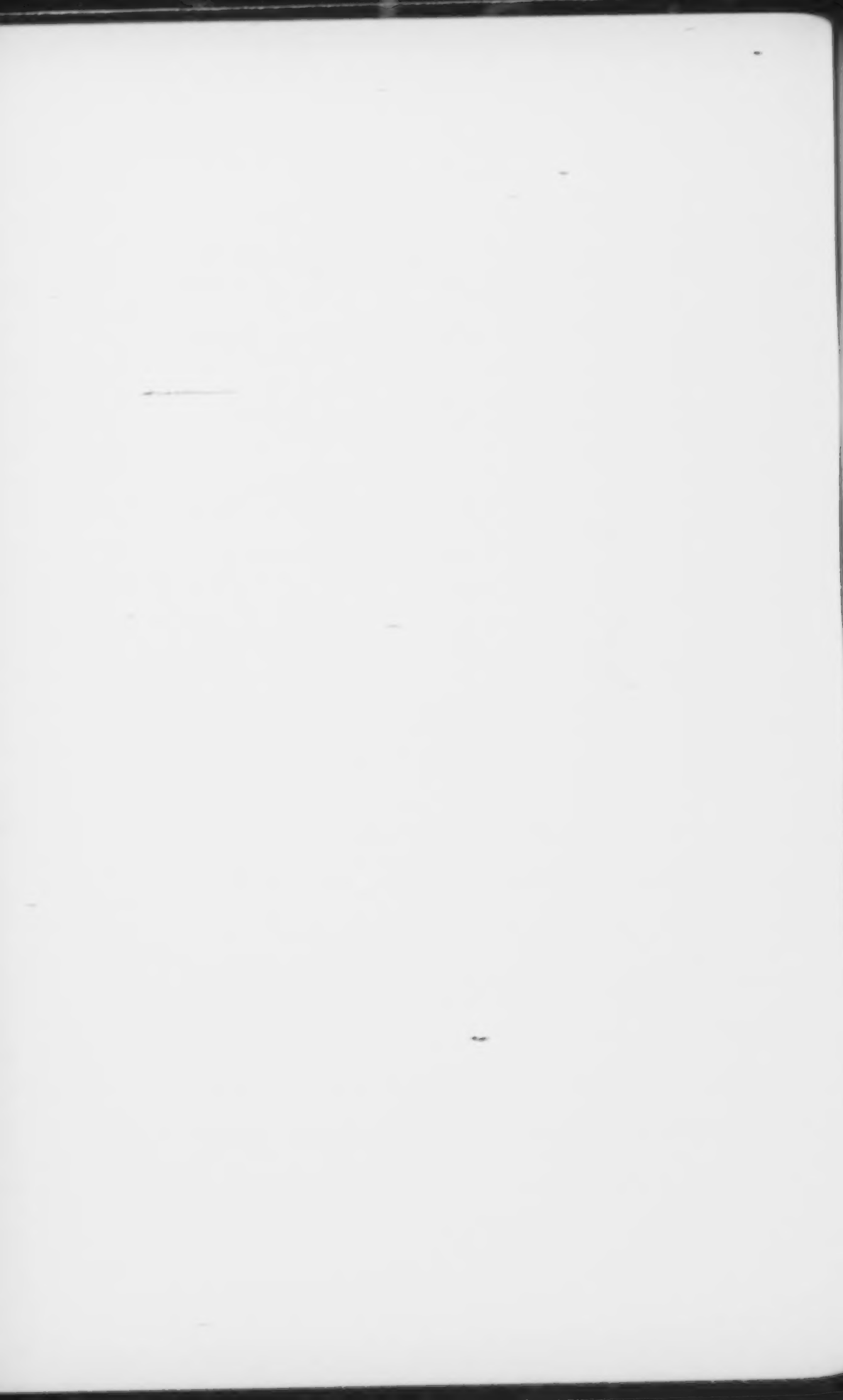


- (q) Albert J. Fiorella,  
dated July 23, 1979;
- (r) Sheldon Katz, dated  
July 23, 1979;
- (s) Jaun Soto, dated  
July 23, 1979;
- (t) Elaine Wilschek,  
dated July 23, 1979;
- (u) Howard S. Weisman,  
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- (v) Stephen Hochhauser,  
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- (w) Reply affidavit of  
Sidney Hackell,  
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(18) The plaintiff's Bill of  
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(23) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

and upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied, and it is further



ORDERED that the said  
Referee's Report be and the same is  
hereby confirmed in all respects, and it  
is further

ORDERED that the First and  
Third Causes of Action be and the same  
are hereby dismissed, and it is further

ORDERED that trial of the  
issues be had before the judge presiding  
unless all parties consent to have the  
referee hear and report, and it is  
further

ORDERED that such trial shall  
commence on March 4, 1980.

/s/ John D. Bennett  
Judge of the  
Surrogate's Court

[ENTERED December 20, 1979.]





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty: RESETTLED ORDER  
Co., suing on behalf of :  
himself and all other : File No. 148704  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
Simon Cohen, deceased, :  
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Individually and doing :  
business as Mid-Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC., :  
BRIMSCO, INC., SIMON :



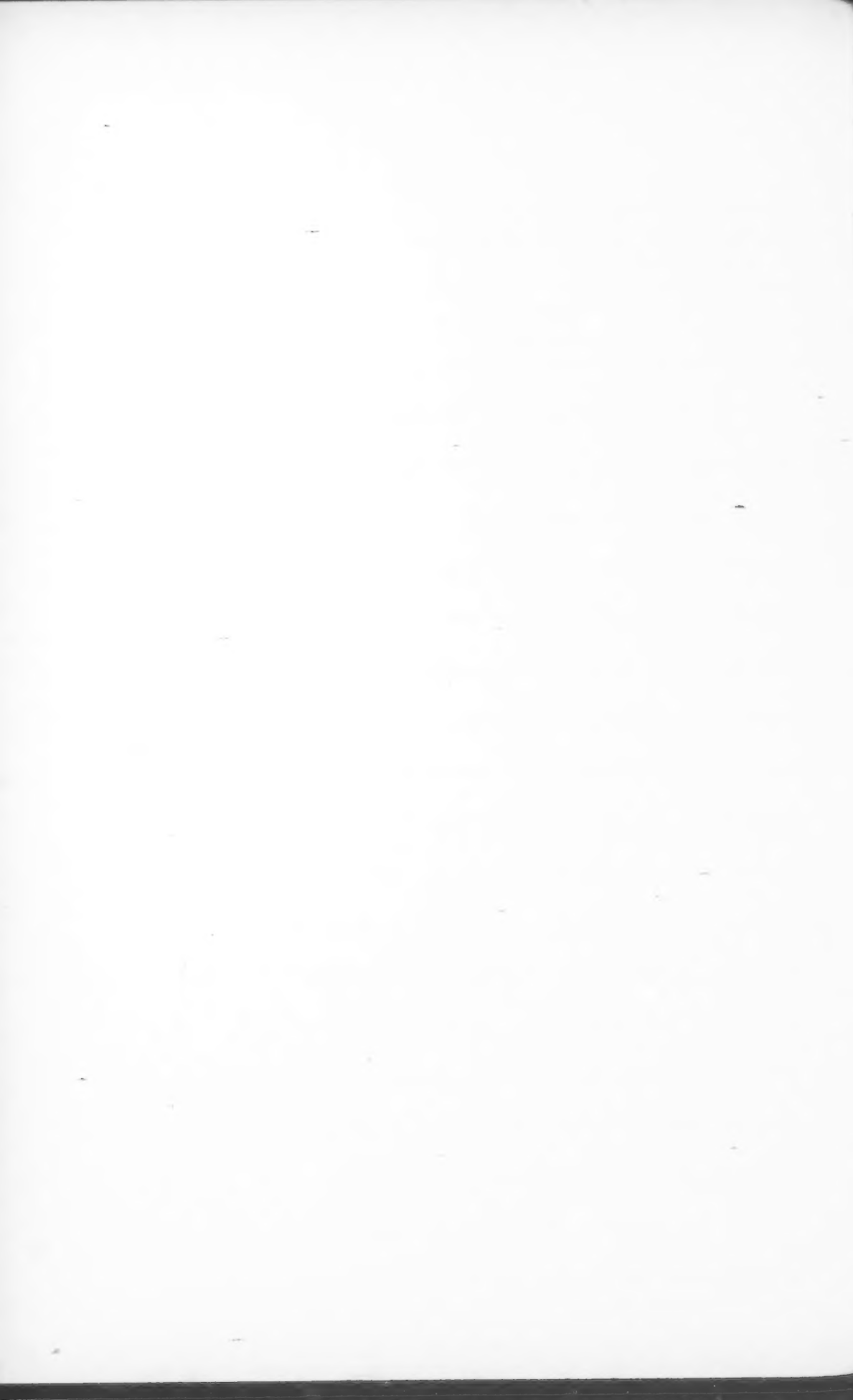
COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO.. and  
ALJER CO., :

Defendants. :

-----X

Defendants having moved by  
notices of motion dated September 6,  
1979, and September 11, 1979, for an  
order to reject the report of the  
Referee dated August 22, 1979, and the  
defendants having appeared by Messrs.  
Speno, Goldberg, Moore, MaRGULES &  
Corcoran, Robert W. Corcoran, Esq., of  
counsel, Albert J. Fiorella, Esq., and  
Messrs. Lubell and Koven, Murray Koven,  
Esq., of counsel, and the plaintiff  
having appeared in opposition thereto by  
Stephen Hochhauser, Esq., and due  
deliberation having been had thereon,  
and a memorandum decision having been  
rendered on November 28, 1979,

NOW, THEREFORE, upon the  
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows;

(1) Original summons and complaint dated August 13, 1971, defendants' answer and counterclaim, dated December 22, 1971, plaintiff's reply, dated May 25, 1972;

(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;



(3) Depositions of Robert Reed, dated December 13, 1972, December 20, 1972, January 12, 1972, February 8, 1973, March 9, 1973, and March 29, 1973, together with plaintiff's Exhibits 1 through 49;

(4) Depositions of Mid-Island Hospital dated October 25, 1973, Beatrice Potter, dated October 25, 1973, Sidney Hackell, dated October 25, 1973, and First National City Bank by Henry McKenzie, dated October 25, 1973;

(5) The affidavit of Robert Reed, dated March 13, 1974;

(6) Plaintiff's supplemental summons and amended and supplemental complaint, dated July 24, 1974, defendant's answers filed June 12, 1975 (Feinerman), June 6, 1975 (Soto, et al.), October 18, 1974 (Executors et al.); plaintiff's reply, dated November 1, 1974;





(7) Transcript of testimony with defendants' Exhibits 1 through 6, on motion for summary judgment, dated February 25, 1975 and February 26, 1975;

(8) Depositions of Sidney Hacekill, dated May 2, 1977, May 3, 1977, May 27, 1977, June 15, 1977, and October 4, 1977, with plaintiff's Exhibits 50 through 62;

(9) Depositions of Sheldon Katz and Volume Feeding, dated May 6, 1977 and November 17, 1977, with plaintiff's Exhibit 63;

(10) Depositions of Judah Feinerman and Jasdane, Inc., dated May 16, 1977 and October 25, 1977;

(11) Depositions of Juan Soto and J.S.K. Cleaning Services, Inc., dated May 9, 1977 and November 28, 1977, with plaintiff's Exhibits 64 and 65;

(12) Deposition of Brimsco, Inc., by Robert Reed, dated May 10,



1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2; Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(15) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1979, September 19, 1978,



and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

(16) Depositions of Stephen Hochhauser, dated January 8, 1979, January 11, 1979, January 16, 1979, January 17, 1979, January 19, 1979, January 24, January 25, 1979, January 29, 1979, January 30, 1979, January 31, 1979, February 2, 1979, February 3, 1979, with defendant's Exhibits G-11 through I-15;

(17) Affidavits submitted and read on the motion for summary judgment with Exhibits annexed:

- (a) Sidney Hackell,  
dated December 31,  
1976;
- (b) Robert Reed, dated  
December 31, 1976;
- (c) Leon Goodman, dated  
December 3, 1976;
- (d) William B.F. Werner,  
dated December 28,  
1976;



- (e) Robert Cohen, dated  
September 26, 1975,  
December 29, 1975,  
March 14, 1979;
- (f) Arthur Press, dated  
May 12, 1979;
- (g) Bernd Bildstein,  
dated May 8, 1979;
- (h) Supplemental  
affidavit of  
Stephen Hochhauser,  
dated April 4, 1979;
- (i) Second supplemental  
affidavit of Robert  
Cohen, dated  
June 13, 1979;
- (j) Stephen Hochhauser,  
dated June 19, 1979;
- (k) Additional affidavit  
of Judah Feinerman,  
dated June 18, 1979;
- (l) Sidney Hackell,  
dated July 23, 1979;
- (m) Robert J. Reed,  
dated July 23, 1979;
- (n) Melvin Schneider,  
dated February 5,  
1979;
- (o) Harry Oster, dated  
June 29, 1979;
- (p) Beatrice Potter,  
dated July 23, 1979;



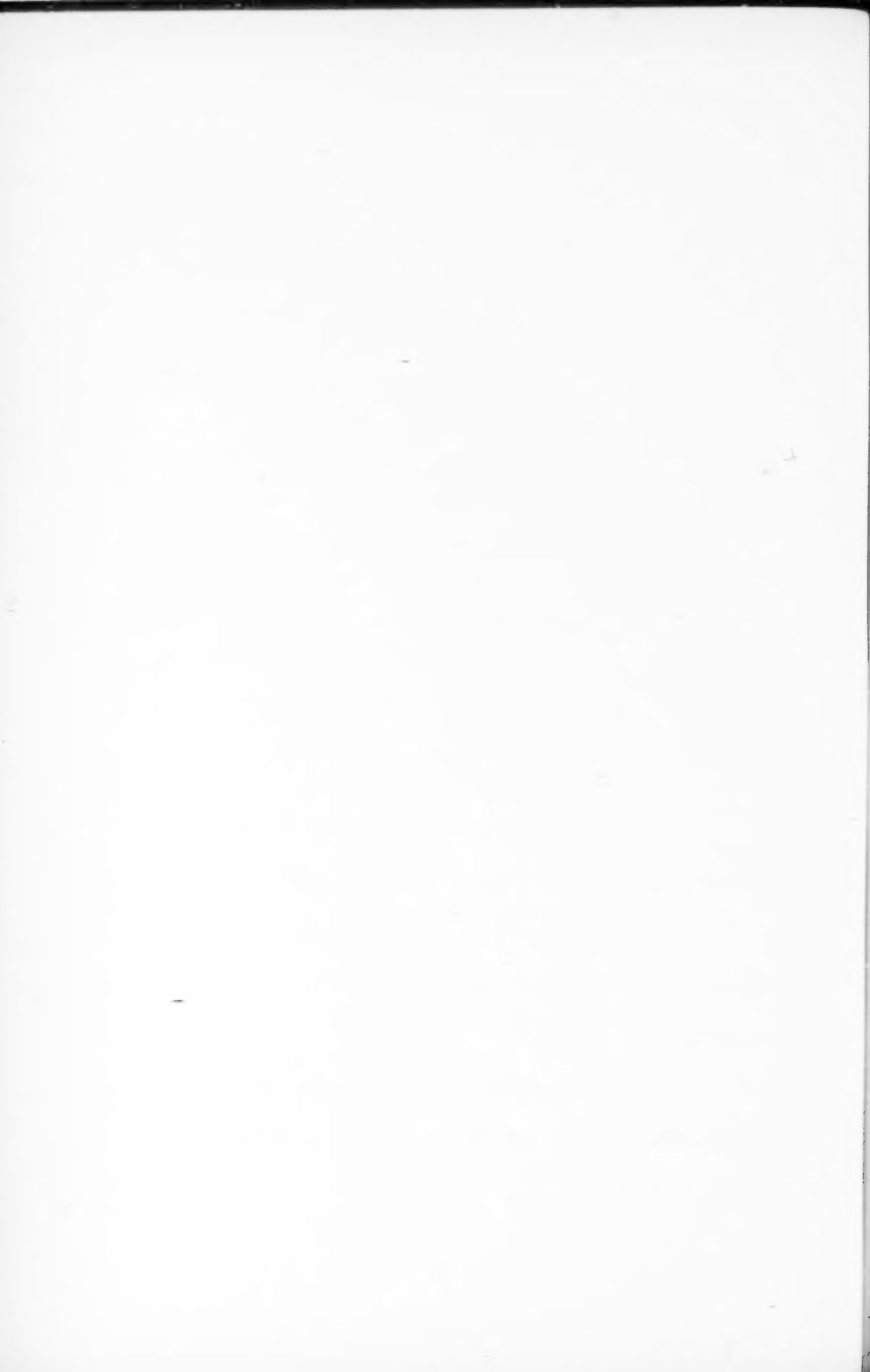


- (q) Albert J. Fiorella,  
dated July 23, 1979;
- (r) Sheldon Katz, dated  
July 23, 1979;
- (s) Jaun Soto, dated  
July 23, 1979;
- (t) Elaine Wilschek,  
dated July 23, 1979;
- (u) Howard S. Weisman,  
dated July 23, 1979;
- (v) Stephen Hochhauser,  
dated July 30, 1979;
- (w) Reply affidavit of  
Sidney Hackell,  
dated August 10,  
1979.

(18) The plaintiff's Bill of  
Particulars, dated September 3, 1975;

(19) Plaintiff's answers to  
defendant's Interrogatories, dated  
September 20, 1975;

(20) Plaintiff's amended and  
Supplemental Bill of Particulars, dated  
July 26, 1978;



(21) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

(22) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977;

(23) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

and upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied and it is further



ORDERED that the said  
Referee's Report be and the same is  
hereby confirmed in all respects, and it  
is further

ORDERED that the First and  
Third Causes of Action be and the same  
are hereby dismissed, and it is further

ORDERED that the motion made  
by defendants, JUAN SOTO, ELAINE  
WILSCHEK, J.S.K. CLEANING SERVICES,  
INC., JUDAH FEINERMAN, JASDANE, INC.,  
SHELDON KATZ and VOLUME FEEDING, INC.,  
for summary judgment dismissing the  
Tenth Cause of Action in the Amended and  
Supplemental Complaint be, and the same  
hereby is, denied, and it is further

ORDERED that trial of the  
issues be had before the Judge presiding  
unless all parties consent to have the  
referee hear and report, and it is  
further



A120

ORDERED that such trial shall  
commence on or after March 4, 1980

/s/ John D. Bennett  
Judge of the  
Surrogate's Court

[ENTERED January 11, 1980.]





SURROGATE'S COURT:

COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty: :  
Co., suing on behalf of :  
himself and all other :  
partners, both general :  
and limited, and in the: :  
right and on behalf of :  
Simon Cohen Real Estate: :  
& Management Co., Simon :  
Cohen Realty Co., Simon: :  
Cohen Company, and :  
Aljer Realty Co., :

ORDER

File No.  
148704

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
Simon Cohen, deceased, :  
WILLIAM B. B. WERNER, :  
Individually and doing :  
business as Mid-Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.: :  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC., :  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO.. and  
ALJER CO., :

Defendants. :

-----X

Defendants having moved by  
notices of motion dated September 6,  
1979, and September 11, 1979, for an  
order to reject the report of the  
Referee dated August 22, 1979, and the  
defendants having appeared by Messrs.  
Speno, Goldberg, Moore, Margules &  
Corcoran, Robert W. Corcoran, Esq., of  
counsel, Albert J. Fiorella, Esq., and  
Messrs. Lubell and Koven, Murray Koven,  
Esq., of counsel, and the plaintiff  
having appeared in opposition thereto by  
Stephen Hochhauser, Esq., and due  
deliberation having been had thereon,  
and a memorandum decision having been  
rendered on November 28, 1979,

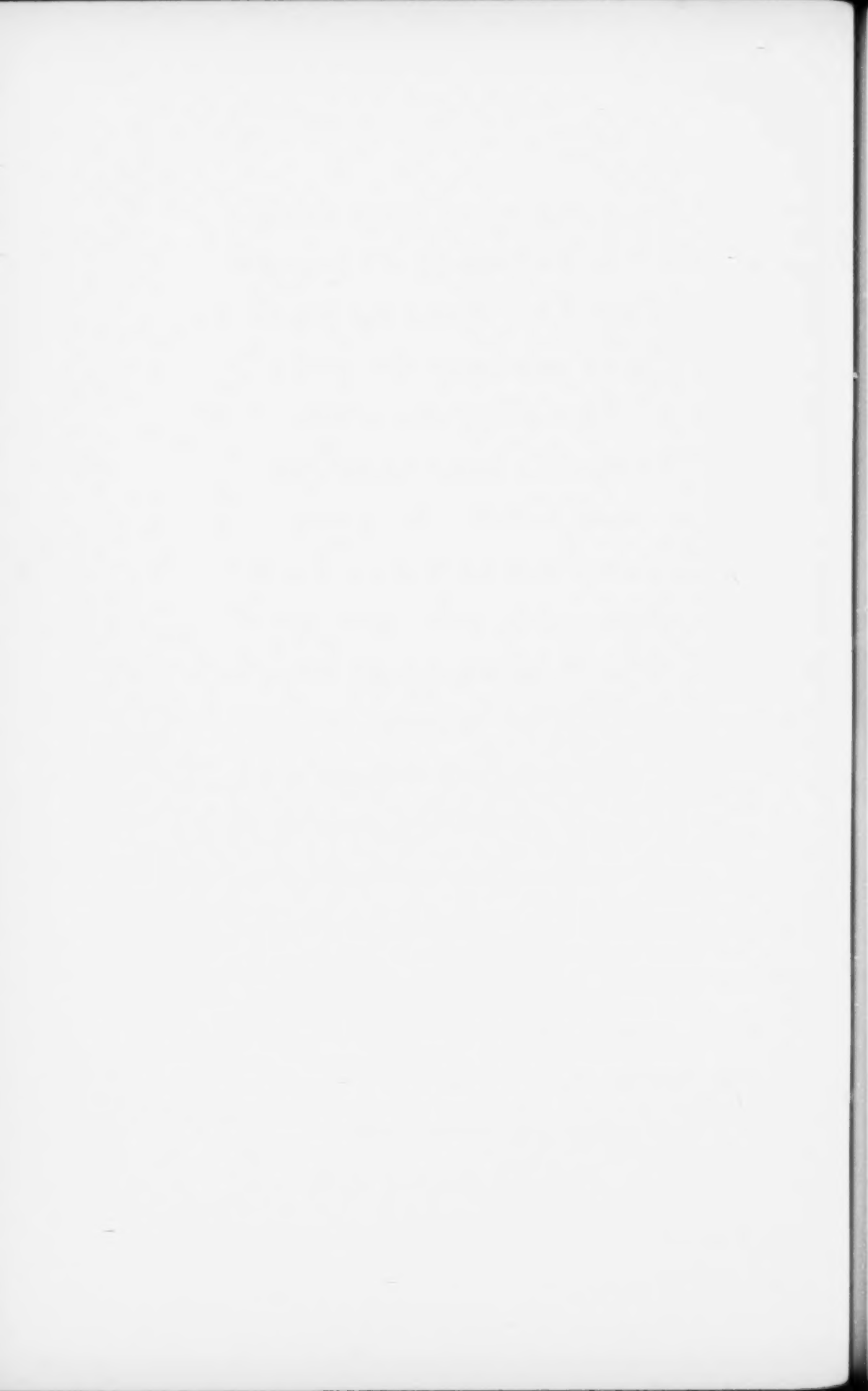
NOW, THEREFORE, upon the  
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows;

(1) Original summons and complaint dated August 13, 1971, defendants' answer and counterclaim, dated December 22, 1971, plaintiff's reply, dated May 25, 1972;

(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;



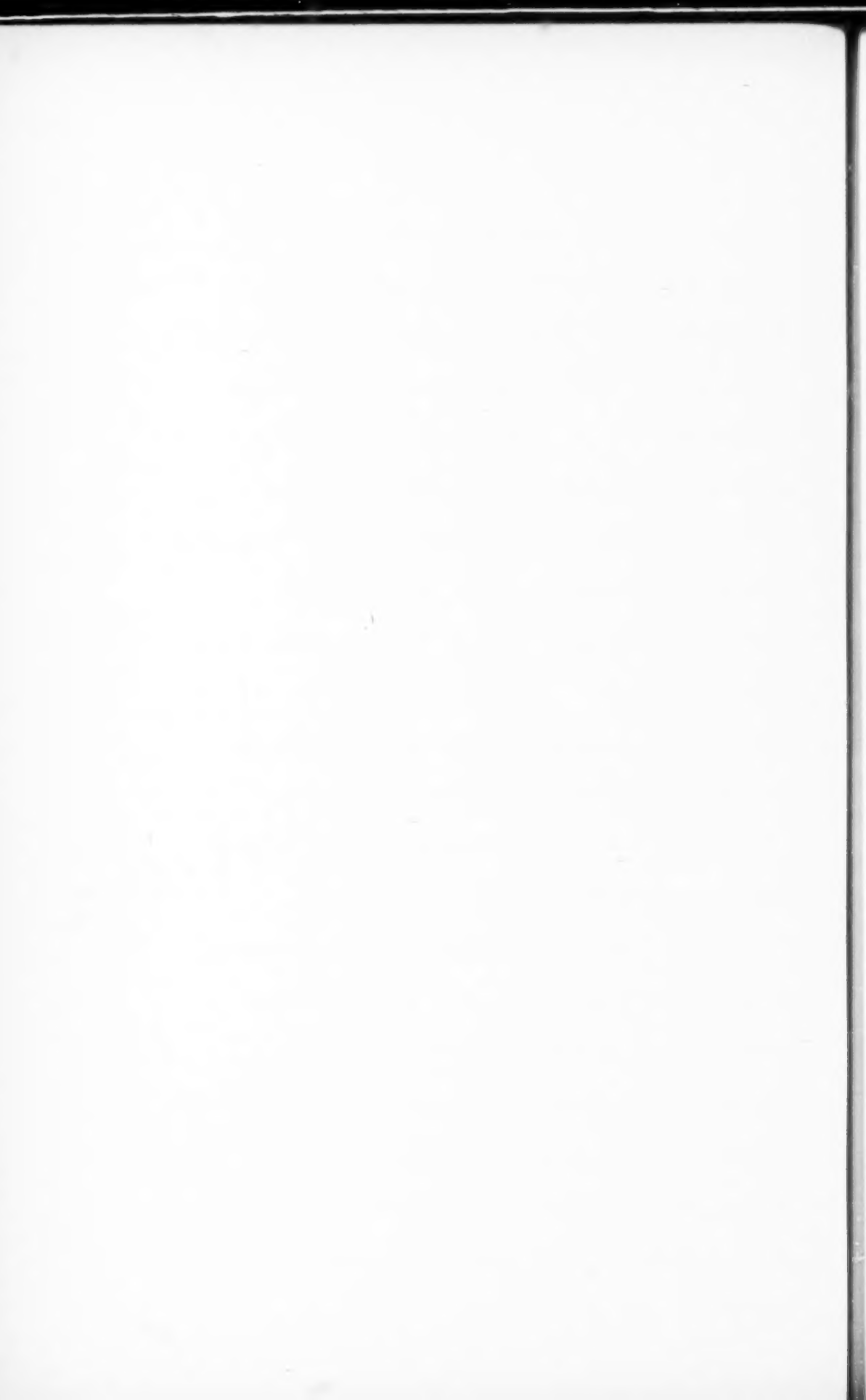
(3) Depositions of Robert Reed, dated December 13, 1972, December 20, 1972, January 12, 1972, February 8, 1973, March 9, 1973, and March 29, 1973, together with plaintiff's Exhibits 1 through 49;

(4) Depositions of Mid-Island Hospital dated October 25, 1973, Beatrice Potter, dated October 25, 1973, Sidney Hackell, dated October 25, 1973, and First National City Bank by Henry McKenzie, dated October 25, 1973;

(5) The affidavit of Robert Reed, dated March 13, 1974;

(6) Plaintiff's supplemental summons and amended and supplemental complaint, dated July 24, 1974, defendant's answers filed June 12, 1975 (Feinerman), June 6, 1975 (Soto, et al.), October 18, 1974 (Executors et al.); plaintiff's reply, dated November 1, 1974;





(7) Transcript of testimony with defendants' Exhibits 1 through 6, on motion for summary judgment, dated February 25, 1975 and February 26, 1975;

(8) Depositions of Sidney Hackell, dated May 2, 1977, May 3, 1977, May 4, 1977, May 27, 1977, June 15, 1977, and October 4, 1977, with plaintiff's Exhibits 50 through 62;

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(10) Depositions of Judah Feinerman and Jasdane, Inc., dated May 16, 1977 and October 25, 1977;

(11) Depositions of Juan Soto and J.S.K. Cleaning Services, Inc., dated May 9, 1977 and November 28, 1977, with plaintiff's Exhibits 64 and 65;

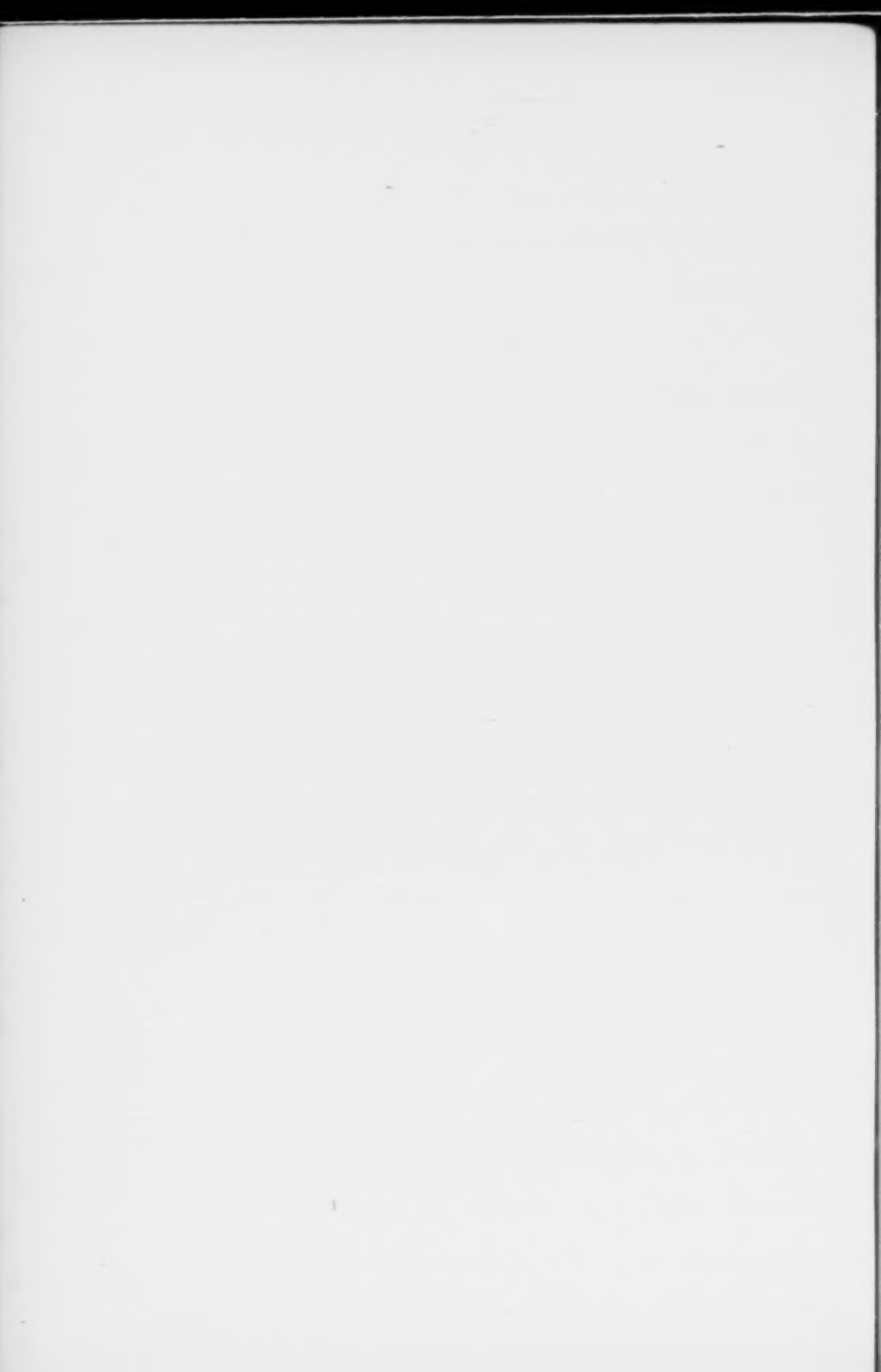
(12) Deposition of Brimsco, Inc., by Robert Reed, dated May 10,



1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2; Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(14) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1979,

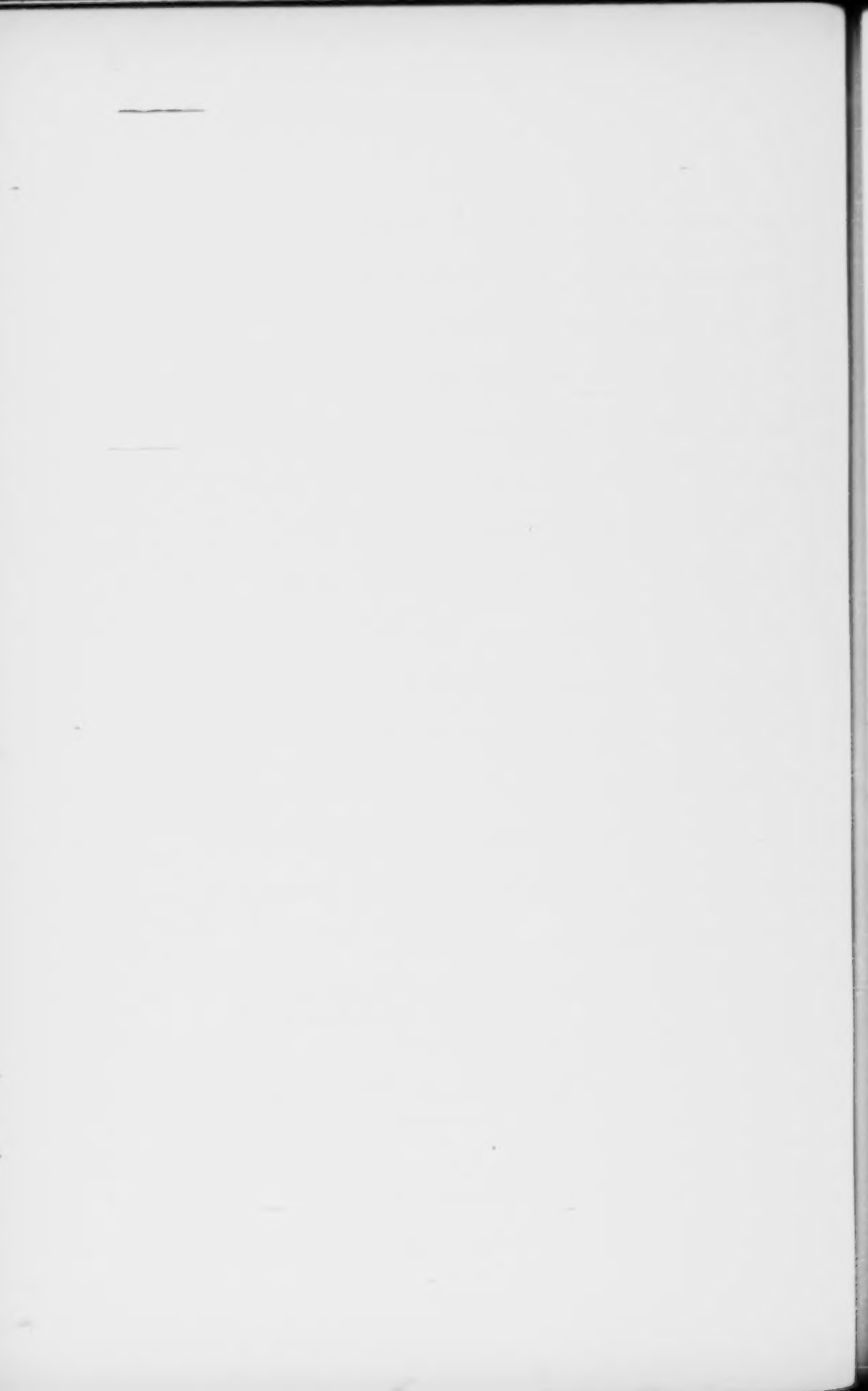


September 19, 1978, and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

(15) Depositions of Stephen Hochhauser, dated January 8, 1979, January 11, 1979, January 16, 1979, January 17, 1979, January 19, 1979, January 24, 1979, January 25, 1979, January 29, 1979, January 30, 1979, January 31, 1979, February 2, 1979, February 3, 1979, with defendant's Exhibits G-11 through I-15;

(16) Affidavits submitted and read on the motion for summary judgment with Exhibits annexed:

- (a) Sidney Hackell, dated December 31, 1976;
- (b) Robert Reed, dated December 31, 1976;
- (c) Leon Goodman, dated December 3, 1976;
- (d) William B.F. Werner, dated December 28, 1976;



- (e) Robert Cohen, dated  
September 26, 1975,  
December 29, 1975,  
March 14, 1979;
- (f) Arthur Press, dated  
May 12, 1979;
- (g) Bernd Bildstein,  
dated May 8, 1979;
- (h) Supplemental  
affidavit of  
Stephen Hochhauser,  
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affidavit of Robert  
Cohen, dated  
June 13, 1979;
- (j) Stephen Hochhauser,  
dated June 19, 1979;
- (k) Additional affidavit  
of Judah Feinerman,  
dated June 18, 1979;
- (l) Sidney Hackell,  
dated July 23, 1979;
- (m) Robert J. Reed,  
dated July 23, 1979;
- (n) Melvin Schneider,  
dated February 5,  
1979;
- (o) Harry Oster, dated  
June 29, 1979;





- (p) Beatrice Potter,  
dated July 23, 1979;
- (q) Albert J. Fiorella,  
dated July 23, 1979;
- (r) Sheldon Katz, dated  
July 23, 1979;
- (s) Juan Soto, dated  
July 23, 1979;
- (t) Elaine Wilschek,  
dated July 23, 1979;
- (u) Howard S. Weisman,  
dated July 23, 1979;
- (v) Stephen Hochhauser,  
dated July 30, 1979;
- (w) Reply affidavit of  
Sidney Hackell,  
dated August 10,  
1979.

(17) The plaintiff's Bill of  
Particulars, dated September 3, 1975;

(18) Plaintiff's answers to  
defendant's Interrogatories, dated  
September 20, 1975;

(19) Plaintiff's amended and  
Supplemental Bill of Particulars, dated  
July 26, 1978;



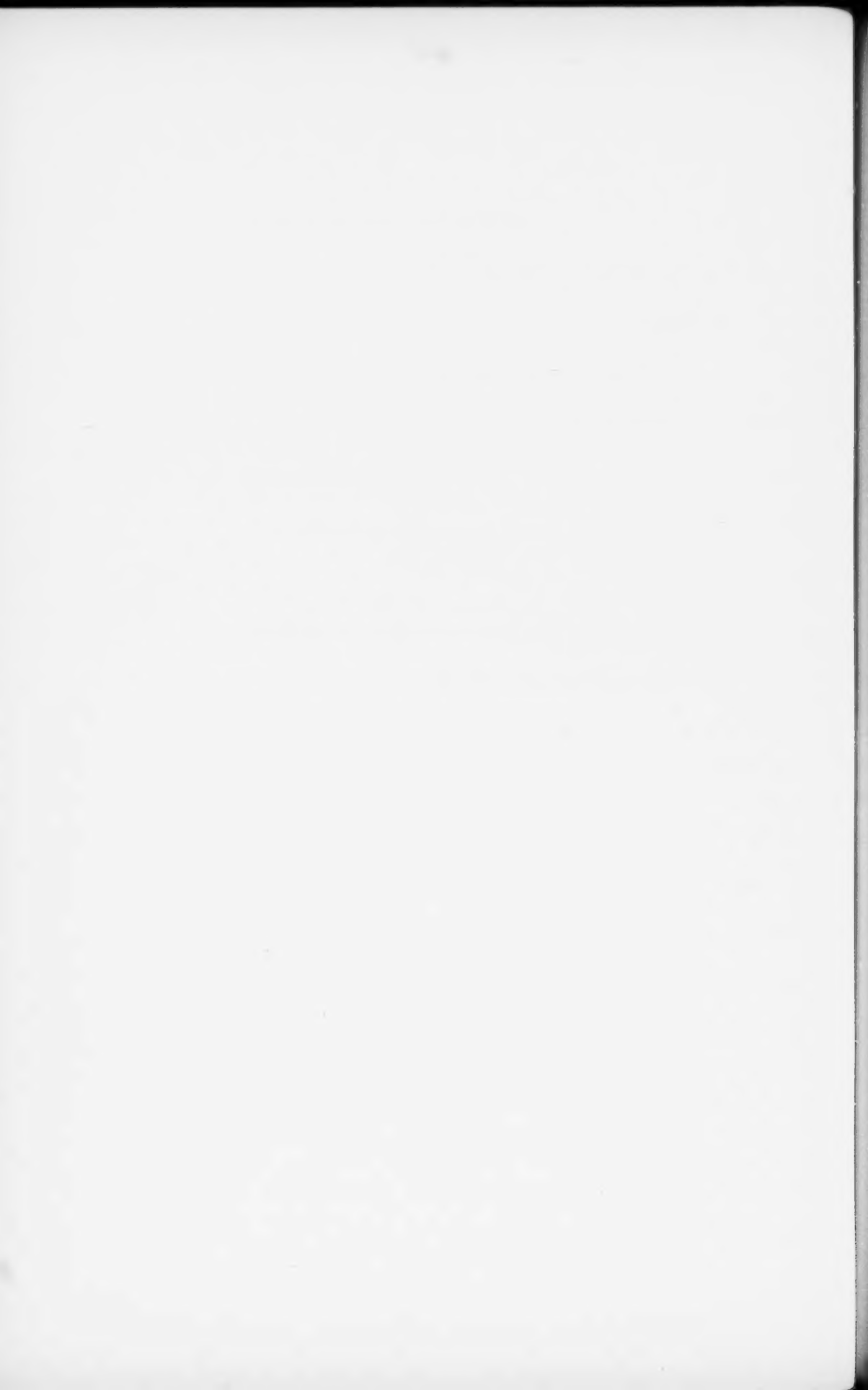
(20) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

(21) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977.

(22) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied, and it is further



ORDERED that the said  
Referee's Report be and the same is  
hereby confirmed in all respects, and it  
is further

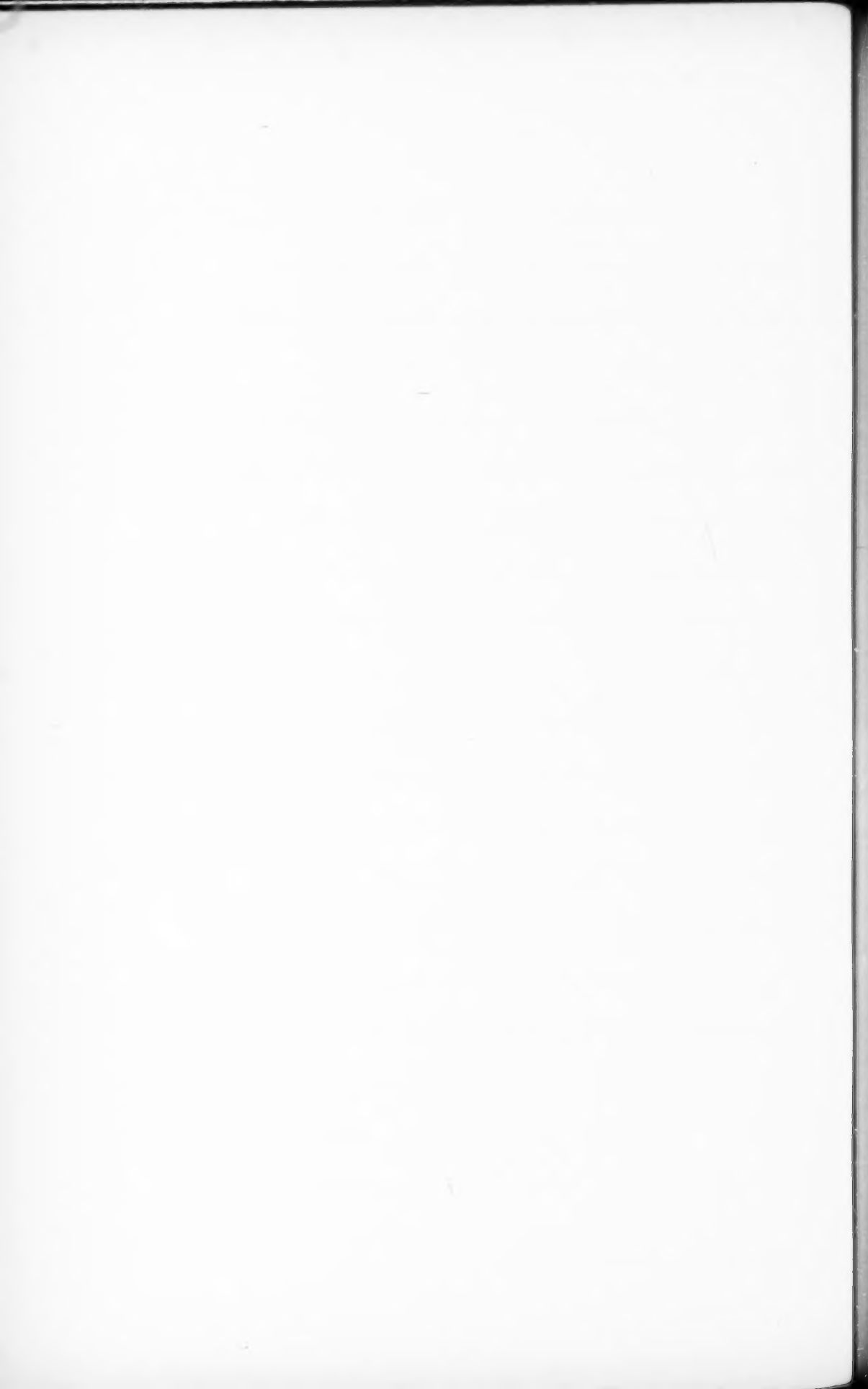
ORDERED that the First and  
Third Causes of Action be and the same  
are hereby dismissed, and that the  
various motions of the defendants are in  
all other respects denied; and it is  
further

ORDERED that trial of the  
issues be had before the Judge presiding  
unless all parties consent to have the  
referee hear and report, and it is  
further

ORDERED that such trial shall  
commence on or after March 4, 1980.

/s/ John D. Bennett  
Judge of the  
Surrogate's Court

[ENTERED January 28, 1980.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty: DECISION  
Co., suing on behalf of :  
himself and all other : File No. 148704  
partners, both general :  
and limited, and in the: Dec. 455  
right and on behalf of :  
Simon Cohen Real Estate:  
& Management Co., Simon :  
Cohen Realty Co., Simon:  
Cohen Company, and :  
Aljer Realty Co., :

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
SIMON COHEN, deceased, :  
WILLIAM B. F. WERNER, :  
Individually and doing :  
business as Mid-Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC., :  
BRIMSCO, INC., SIMON :





COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

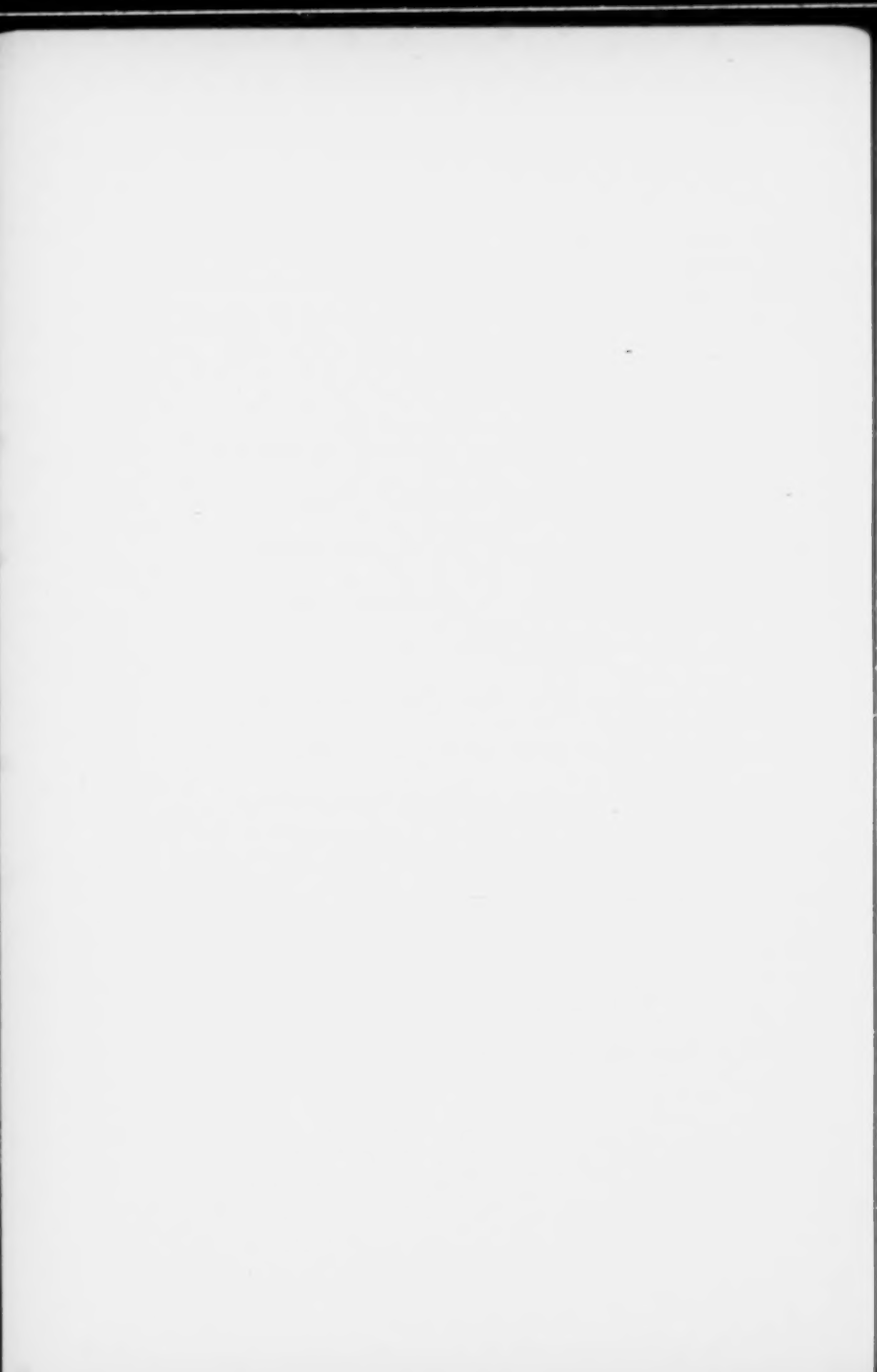
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This court settled an order on January 11, 1980, but we have also now received correspondence from the firm of Speno, Goldberg, Moore, Margules and Corcoran requesting that the order be once again resettled for the reason set forth in their correspondence. The court finds that the request has merit, and accordingly, the new order submitted will be signed if found to be in proper form.

Proceed accordingly.

Dated: January 28, 1980

JOHN D. BENNETT  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a Partner :  
of Simon Cohen Real :  
Estate & Management :  
Co., Simon Cohen Realty :  
Co., Simon Cohen :  
Company and Aljer : DECISION  
Realty Co., suing :  
on behalf of himself : File No. 148704  
and all other :  
partners, both general : Dec. 308  
and limited, and in the :  
right and on behalf of :  
Simon Cohen Real Estate :  
& Management Co., Simon :  
Cohen Realty Co., Simon :  
Cohen Company and :  
Aljer Realty Co.,

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER, and THE FIRST :  
NATIONAL CITY BANK, :  
Individually and as :  
Executors of the Last :  
Will and Testament of :  
Simon Cohen, deceased, :  
William B.F. Werner, :  
Individually and doing :  
business as Mid Island :  
Hospital, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., DADGAB,



INC., BRIMSCO, INC., :  
 SIMON COHEN REAL  
 ESTATE & MANAGEMENT :  
 CO., SIMON COHEN  
 REALTY CO., and :  
 ALJER REALTY CO., :

Defendants.

-----X

In this proceeding by Robert Cohen individually and on behalf of various partnerships against the executors of his father's estate, the defendants Juan Soto, Elain Wilschek, and J.S.K. Cleaning Services, Inc. seek to examine the records of an expert witness, Bernd Bildstein. The plaintiff opposes the application.

The plaintiff has submitted the witness's records for in camera review. Basically, the records consist of the following: 1) billing records; 2) documents relating to the expert's retainer agreement with the plaintiff; 3) research in connection with accounting standards and practices,



about which the expert testified; and  
4) personal notes prepared by the  
witness in connection with affidavits  
submitted in this proceeding.

The items relating to the  
retainer agreement or billing  
arrangements with the plaintiff are  
irrelevant to the issues in this  
proceeding.

The items which are in  
evidence or marked for identification in  
this proceeding or in pre-trial  
discovery proceedings, or otherwise on  
file with the court, are available to  
the defendants and are therefore not a  
proper subject for the instant  
application (Kent v. Maryland Cas. Co.,  
25 AD2d 653).

The witness's research notes  
and notes made in preparation of  
affidavits submitted to the court are  
material prepared for litigation and





therefore not discoverable (Seaview Chief Inc. v. Transamerica Ins. Co., 61 AD2d 1043; Penn Plaza Venture v. Glens Fall's Ins. Co., 32 AD2d 768; Parker v. New York Tel. Co., 24 AD2d 1067; CPLR 3101 subd. [d][1]). The defendants have not established that the materials fall within the exception set forth in subdivision [d] of CPLR 3101.

The application is therefore denied. In order to preserve the records for appeal they will be photocopied at the expense of the defendants seeking discovery.

Dated: November 12, 1981

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File 148704  
ually and as a partner  
of Simon Cohen Real : Dec. 862  
Estate Co., etc.,

: DECISION  
Plaintiff,

- against -

ROBERT J. REED, et al.,  
Defendants.

Estate of SIMON COHEN,  
Application to Fix :  
Attorneys' Fees under :  
SCPA 2110. :

-----X

This proceeding, which was transferred to this court from the Supreme Court, Nassau County, is one in which the decendent's son, individually and as a partner on behalf of certain partnerships, alleges that the decedent and certain defendants were parties to a conspiracy to siphon monies from the



Mid-Island Hospital, Bethpage, New York, thereby reducing the profits of a partnership known as Simon Cohen Real Estate and Management Company (SCREAM). The plaintiff also alleges other attempts to misappropriate funds from the partnerships by partners and other individuals. Additional allegations contained in the fifteen causes of action which survived a motion for summary judgment and dismissal need not be explored for the purpose of this decision.

By order to show cause the plaintiff, Robert Cohen, has applied for an order pursuant to CPLR 321 directing that Mr. Hochhauser be relieved as attorney for the plaintiff, determining his fee, determining the fee of a former attorney, Mr. Shannon, and directing

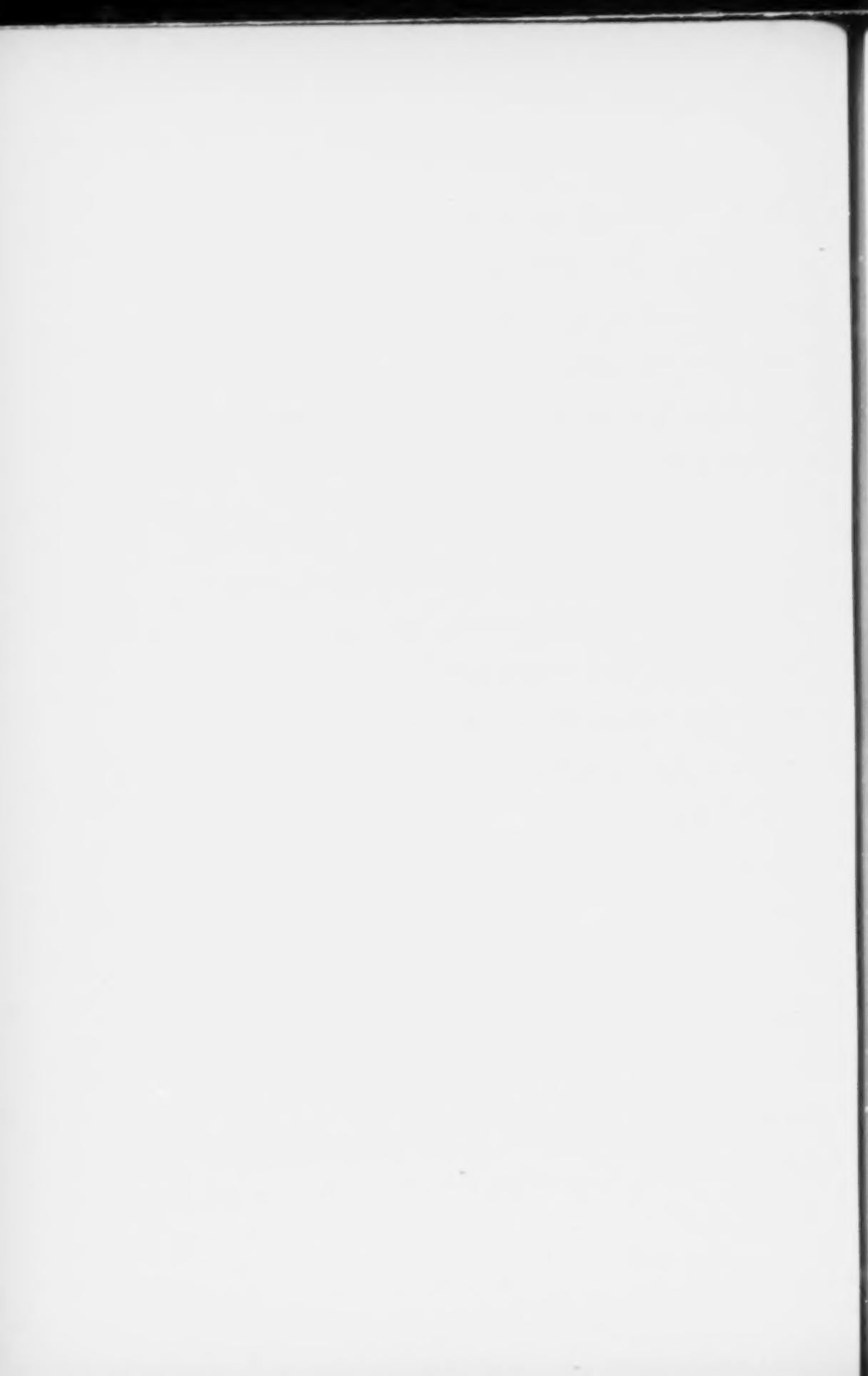


both attorneys to turn over certain records. Mr. Hochhauser has made a cross-motion for advice and direction and for an order fixing his fee. Mr. Shannon has made a cross-motion for an order fixing his fee.

The plaintiff states in his affidavit that he is dissatisfied with the services rendered by Mr. Hochhauser generally, and particularly with the position taken by Mr. Hochhauser with respect to certain settlement proposals. The plaintiff takes the position that he has an absolute right to discharge his attorney.

Mr. Hochhauser has applied to the court for advice and direction stating that it is his position that Mr. Cohen cannot properly represent the other partners because he is in a





conflict of interest. Mr. Hochhauser states that certain settlement proposals are in the best interests of the partnerships but that these proposals have been rejected by Mr. Cohen because of his desire to oust Mr. Reed (an executor of the estate, general partner of SCREAM, and executive director of the hospital) from a position of control in the Mid-Island Hospital. Mr. Hochhauser states that Mr. Cohen's objections to a settlement are motivated by a personal animosity towards Mr. Reed. Mr. Cohen concedes that he finds the settlement proposals unacceptable in part because they do not provide for the removal of Mr. Reed.

To date, the record in this proceeding comprises more than 5,500 pages and at the time of the instant



motion the plaintiff was a few days short of resting his case, which has taken over fifty days to try to date.

On the motion for summary judgment and to dismiss the complaint the defendants raised questions concerning Mr. Cohen's status to commence an action on behalf of the limited or general partners of some of the partnerships. In a referee's report (August 22, 1979) which was confirmed by the court in a decision dated November 28, 1979 it was determined that Mr. Cohen's status vis a vis SCREAM could not be determined on a motion for summary judgment, but that the complaint would be construed liberally as an allegation by Mr. Cohen that he was a general partner and in the alternative that he was a limited partner of SCREAM.



The fact that the plaintiff states in his complaint that the causes of action numbered "One" through "Sixteenth" are brought pursuant to Section 115a of the Partnership Law is sufficient to bring these causes of action with the general procedural rules which normally govern derivative actions, for the purpose of this motion.

As a general rule, a client has the right to discharge his attorney at any time and for any reasons which to him seem satisfactory (*Matter of Dunn*, 205 NY 398; *Kertatos v. Ferreri*, 17 Misc.2d 617) subject to any retaining (*Griffing v. Kearns*, 285 App.Div. 952; Judiciary Law Section 475) or charging lien which the attorney may have.

It has been observed, however, that in derivative and class actions the



traditional roles of attorney and client may to some extent be inapplicable (see, Developments in the Law, Class Actions, 89 Harv. L. Rev. 1318).

A derivative suit is brought by the nominal plaintiff in the name of the corporation or partnership. The corporation or partnership is the real party in interest. The plaintiff is merely an instigator (Carruthers v. Waite Mining Co., 306 NY 136). He has been likened to a guardian ad litem (Denicke v. Anglo California Nat. Bank, 141 F.2d 285 cert. denied 323 U.S. 739).

It has been held that an attorney in a class action may not look to the nominal plaintiff as his exclusive client. Where a potential conflict arises, he has a duty to point out the conflict to the court so that





appropriate steps can be taken to protect the other stockholders (Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 cert. denied 439 U.S. 1115). The same principle would apply in a derivative action pursuant to Section 115a where the other partners may be unaware of potential conflicts. The potential for abuse or inadequate representation in derivative suits is well recognized (Haudeck, The Settlement and Dismissal of Stockholders' Actions, Part II, 23 S.W.L.J. 772; McLaughlin, Capacity of Plaintiff Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421).

The allegation of a conflict of interest is sufficient to bring this matter within the scope of the court's power to conduct an inquiry where it



appears that the interests of absent partners may be jeopardized. If in fact the plaintiff's actions are motivated by personal animosity towards Mr. Reed he is in as much of a conflict as a representative plaintiff who has an adverse pecuniary interest (see, *Norman v. Arcs Equities Corp.*, 73 F.R.D. 502).

Additionally, it is noted that there is authority for the proposition that a nominal plaintiff does not have the power to substitute counsel over the objections of those he represents (*Scott v. Donhaue*, 269 P. 774).

Moreover, one of the primary reasons for substitution of attorneys in this case appears to be a disagreement over settlement proposals. The final decision as to the acceptability of a compromise of a derivative suit brought



by a limited partner is with the court (Partnership Law 115a subd. [4]), which must approve any compromise.

While a representative plaintiff has a duty to prosecute an action vigorously (Doglow v. Anderson, 43 F.R.D. 472), he has a concomitant duty to use wise judgment in negotiating a fair and reasonable settlement (Norman v. Arcs Equities Corp., supra).

In a derivative suit, a compromise will rarely be approved without the consent of the nominal plaintiff (Saylor v. Lindsley, 456 F.2d 896). However, the Court has the power to impose a settlement over his objection (Flinn v. FMC Corp., 528 F.2d 1169 cert. denied 424 U.S. 967; Purcell



v. Keane, 54 F.R.D. 455; see also, Saylor v. Lindsley, supra).

The court therefore finds that the limited and general partners of the various partnerships should be apprised of (1) the status of negotiations in this matter; (2) the application for an order substituting counsel; and (3) questions raised as to a possible conflict of interest.

A hearing will be conducted on October 4, 1982 to determine whether an order should be made substituting Schoeman, Marsh, Updike & Welt as plaintiffs' attorney, whether Mr. Cohen is in a conflict of interest, and if so, what corrective steps are to be taken. Notice to the limited and general partners of Simon Cohen Real Estate and Management Company, Simon Cohen Realty





Company, Aljer Realty Company and Simon Cohen Company shall be made by mailing a copy of this decision and the Notice of Hearing appended to this decision within ten (10) days of the order following the decision. The plaintiff is to bear the cost and responsibility of notification. The names of those to receive said notice are to be supplied to the plaintiff by Mr. Reed and his attorneys.

The question of attorneys' fees will be held in abeyance pending determination of the above.

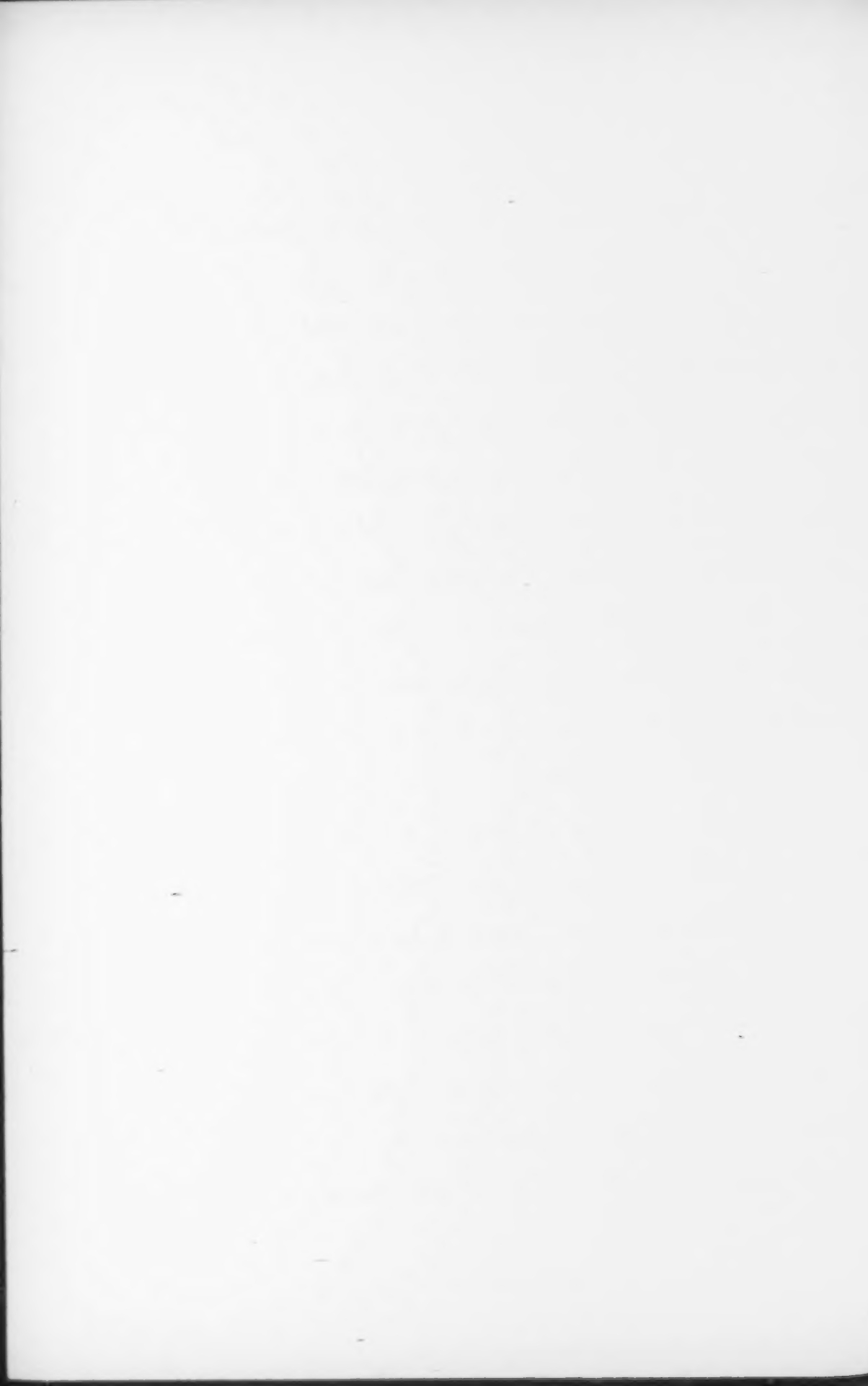
A question has been raised concerning the appropriateness of a motion pursuant to CPLR in this court. Mr. Shannon has moved for an order directing the plaintiff to seek relief by way of a motion pursuant to section



2110 of the Surrogate's Court Procedure Act.

However, since payment of attorney's fees is sought from Robert Cohen individually, and not from the estate, or his share of the estate, the application is not a proper subject of a proceeding pursuant to SCPA 2110.

The lien sought to be enforced is a retaining lien which, unlike the statutory charging lien from which 2110 is derived, is a common law lien which is confined to the property in the possession of an attorney (Matter of Cooper, 291 NY 255). There is no basis for the conclusion that this court is without jurisdiction to fix a retaining lien incidental to a motion pursuant to CPLR 321 (1A Warrens Heaton on Surrogates' Court, Section 47, para. 3),



and clearly the question of attorneys' fees is one which should be resolved in the forum in which the action is pending and which is most familiar with the facts and circumstances of an extremely complex case.

An additional jurisdictional question not raised as yet involves the court's authority to determine the merits involved in the many different types of complaints which have been transferred to this court by the Supreme Court.

The jurisdiction of the Surrogate's Court has gradually expanded to include many causes of action over which the Supreme Court has concurrent jurisdiction (Matter of Brandt, 81 AD2d 268; Matter of Finkle, 90 Misc.2d 550 aff'd 59 AD2d 862; Matter of Breitman,



450 NYS2d 985). Whenever possible all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court (Peekskill Community Hospital v. Sayres, 450 NYS2d 527).

However, the recent case of Piccione (85 AD2d 604 and 85 AD2d 605) has caused concern regarding the extent of jurisdiction of this court (see Matter of Leichter, NYLJ 1/6/81 [Nassau Co.]; see also, Wyath v. Fulrath, 13 AD2d 250; Matter of Lainez, 79 AD2d 78 aff'd 55 NY2d 657). The Piccione case is presently on appeal to the Court of Appeals and will not be decided until the fall.

The court is of the opinion that it has subject matter jurisdiction of this proceeding (N.Y. Const. Art. 6,





Section 12 subd. [d]). In addition to the specific jurisdiction of the Surrogates set forth in the State Constitution, the Constitution provides that the legislature may confer additional jurisdiction to the Surrogate's Court (N.Y. Constitution, Article 6, Section 12[d]), and the legislature has so provided by having the Supreme Court transfer matters to this court and give this court jurisdiction of the Supreme Court derivatively (SCPA 5011[b]; CPLR 325[e]; Matter of Suchoff, 55 Misc.2d 284). However, after consultation with this county's Administrative Judge it has concluded that too much time has been expended in this matter to have a determination made by the court placed in jeopardy for lack of jurisdiction,



and it therefore may be safer for this action to be determined by the Supreme Court until the jurisdictional issue is decided by the Court of Appeals or resolved by legislation.

Therefore, if the attorneys consent on behalf of their clients, the Surrogate, as Acting Supreme Court Justice, will approve the re-transfer of this action to the Supreme Court, Nassau County (see *Huston v. Rao*, 74 Misc.2d 127) to be tried by him as Acting Supreme Court Justice, with the understanding that the transcript of the hearing to date and all that has been admitted into evidence will be deemed to have taken place before the Acting Supreme Court Justice.



A155

Settle order on five days'  
notice, with three additional days if  
service is made by mail.

Dated: August 2, 1982

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : NOTICE OF  
ually and as a partner : HEARING  
of Simon Cohen Real :  
Estate Co., Inc., : File 148704  
Plaintiff, :

- against -

ROBERT J. REED, et al., :  
Defendants. :

ESTATE OF SIMON COHEN :  
-----X

NOTICE OF HEARING

This proceeding commenced by  
Robert Cohen, individually and on behalf  
of certain partnerships, having been  
transferred from the Supreme Court,  
Nassau County, is now pending in the  
Surrogate's Court, Nassau County.





DESCRIPTION OF LITIGATION

The amended and supplemental complaint alleges seventeen causes of action, sixteen of which are brought derivatively on behalf of the following partnerships: Simon Cohen Real Estate and Management Company (SCREAM); Simon Cohen Company (SCC); Simon Cohen Realty Company (SCR); and Aljer Realty Company (Aljer). The defendants are the various partnerships; the executors of the estate of Simon Cohen individually and in their fiduciary capacities as executors, and in some cases as general partners in the various partnerships; William B. F. Werner; Mid-Island Hospital (M-I-H); Juan Soto; Elaine Wilschek; Sheldon Katz; Judah Feinerman; J. S. K. Cleaning Services, Inc.,



Jasdane, Inc.; Volume Feeding, Inc.;  
DADGAB, Inc; and Brimsco, Inc.

The following is a general summary of the causes of action and is not intended to be all-inclusive.

The first cause of action concerns a sublease between M-I-H and SCREAM and alleges that the negotiations between M-I-H and SCREAM for a sublease which allegedly provided that SCREAM would be entitled to 100% of the rents and profits of M-I-H inadvertently omitted a provision which would have provided for inspection of M-I-H's books and records. A reformation of the sublease is sought. The second cause of action brought on behalf of SCREAM alleges that the omission with respect to the inspection and audit was a product of fraud. The third cause of



action is a claim that the sublease impliedly gives a right of inspection and audit.

The fourth cause of action on behalf of SCR alleges that Simon Cohen made unauthorized withdrawals from SCR. The fifth cause of action alleges that Reed, Hackell, Potter, Citibank and Werner-M-I-H aided and abetted Simon Cohen in carrying out and concealing the wrongful withdrawals.

The sixth cause of action concerns the alleged failure of the executors to inform the SCR partners of the alleged wrongdoing.

The seventh cause of action brought on behalf of SCREAM alleges that Simon Cohen made wrongful withdrawals from SCREAM for his personal use. The eight cause of action concerns alleged



wrongful acts by Reed in connection with repayment of alleged loans from SCREAM to Simon Cohen. The ninth cause of action alleges that Simon Cohen, with Reed's assistance, permitted Werner-M-I-H to enter into contracts with various businesses as a result of which Werner-M-I-H paid substantially greater sums for services which had previously been performed by its employees and that this resulted in a loss of revenues to SCREAM. The tenth cause of action alleges that some of the defendants knew and participated in the alleged scheme to defraud SCREAM. The eleventh cause of action alleges that Reed wasted the assets of SCREAM.

The twelfth cause of action alleges that Reed wasted the assets and mismanaged SCR.





The thirteenth cause of action alleges that Reed wasted the assets and mismanaged SCC. The fourteenth cause of action alleges that Reed breached his fiduciary duty to SCC by diverting business opportunities and income. The fifteenth cause of action alleges that Simon Cohen engaged in self-dealing in connection with SCC.

The sixteenth cause of action alleges that Reed has wasted the assets and mismanaged the business of Aljer.

The seventeenth cause of action is brought by Robert Cohen individually and alleges that Robert Reed wrongfully filed an amendment to a partnership agreement which provided for Robert Cohen's resignation as a general partner.



### HISTORY OF LITIGATION

The original complaint in this action was served in 1971. An amended and supplemental complaint was served in August, 1974. The defendants moved for an order dismissing each cause of action and an order granting summary judgment. The court reserved decision to allow the parties to exhaust all discovery devices. Following the completion of discovery reargument of the motion for summary judgment was made before the Hon. C. Raymond Radigan as Referee. In a report dated August 22, 1979 he recommended that the motion for an order granting summary judgment be denied and the motion for an order dismissing the first and third causes of action be granted and that the motion for an order dismissing each of the remaining causes



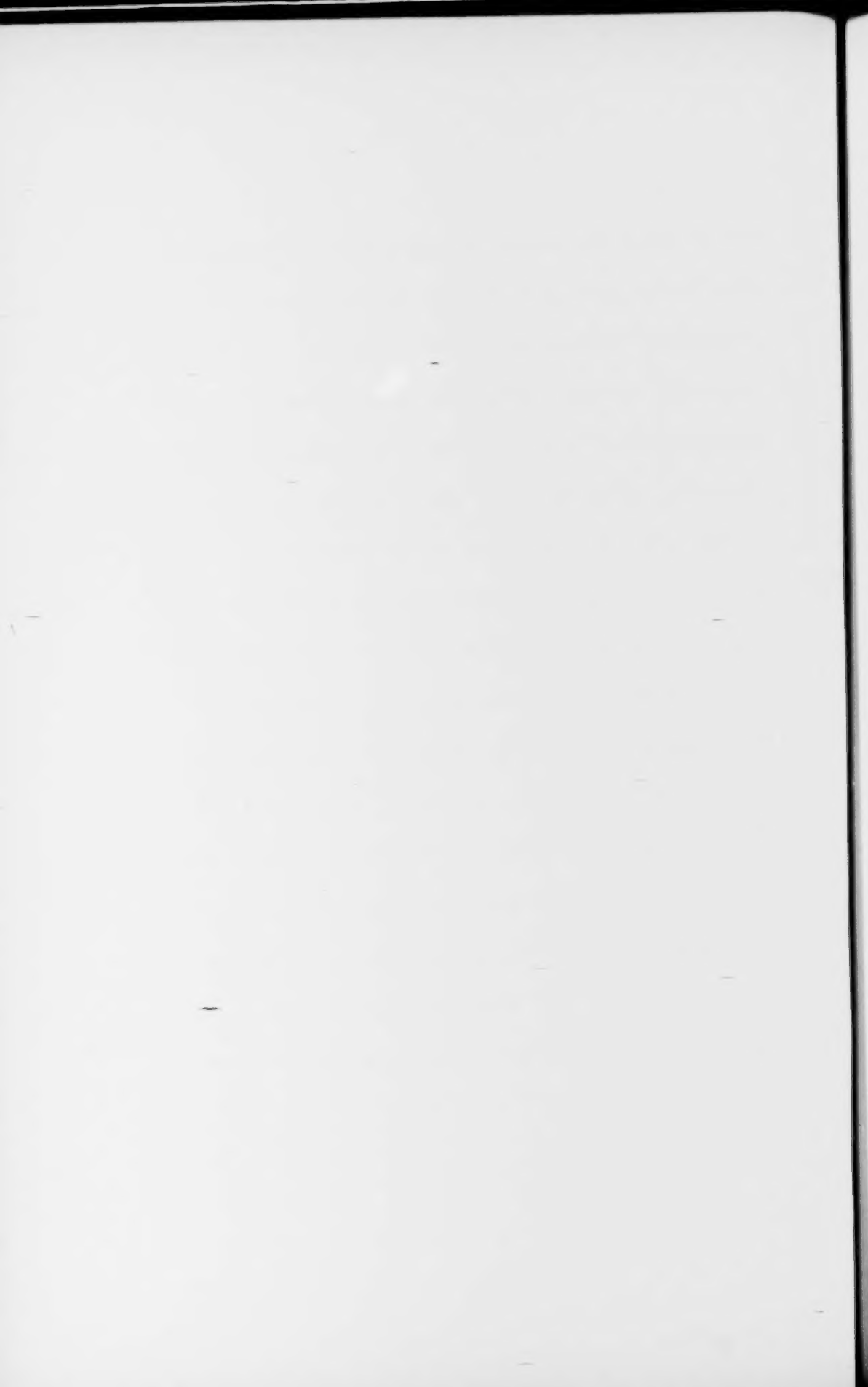
of action be denied. The report was confirmed by Surrogate Bennett in a decision dated November 28, 1979.

The trial commenced before the Hon. C. Raymond Radigan as Referee. Thereafter, the parties consented to have the case continue before him as Surrogate of Nassau County. Currently, more than fifty days have been occupied at trial. Towards the end of the plaintiff's case the plaintiff, Robert Cohen, filed a motion requesting that Mr. Hochhauser be discharged as plaintiff's attorney, that his fee be determined and that he be required to turn over books and records in his possession. Mr. Hochhauser made a cross-motion for advice and direction stating that Mr. Cohen has obstructed settlement negotiations because he was



motivated by personal animosity towards Mr. Reed and would not accept any proposal which did not provide for the removal of Mr. Reed as executive director of M-I-H. Mr. Hochhauser further states that Mr. Cohen is in a conflict of interest as nominal plaintiff in the derivative suits. In its decision dated July 30, 1982 which is attached to this Notice, the court determined that the limited and general partners of Aljer, SCREAM, SCC and SCR should be apprised of (1) the status of the negotiations in this matter; (2) the application for an order substituting counsel; and (3) the question raised as to a possible conflict of interest.





NOTICE OF HEARING

A hearing will be conducted on October 4, 1982 at 9:30 a.m. in connection with the above at the Nassau County Surrogate's Court, 262 Old Country Road, Mineola, New York. Anyone who wishes to be heard on this matter should appear in person or by counsel at that time. If the trial on the outstanding causes of action is to continue the court will make a further order, after the hearing herein provided is completed, concerning if the Surrogate will continue the trial or if he will continue the trial as an Acting Supreme Court Justice as provided for in the decision to which this notice is attached.

Dated: August 2, 1982



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File 148704  
ually and as a partner  
of Simon Cohen Real : Dec. 862  
Estate and Management  
Co., :

Plaintiff, : ORDER WITH  
NOTICE OF  
SETTLEMENT

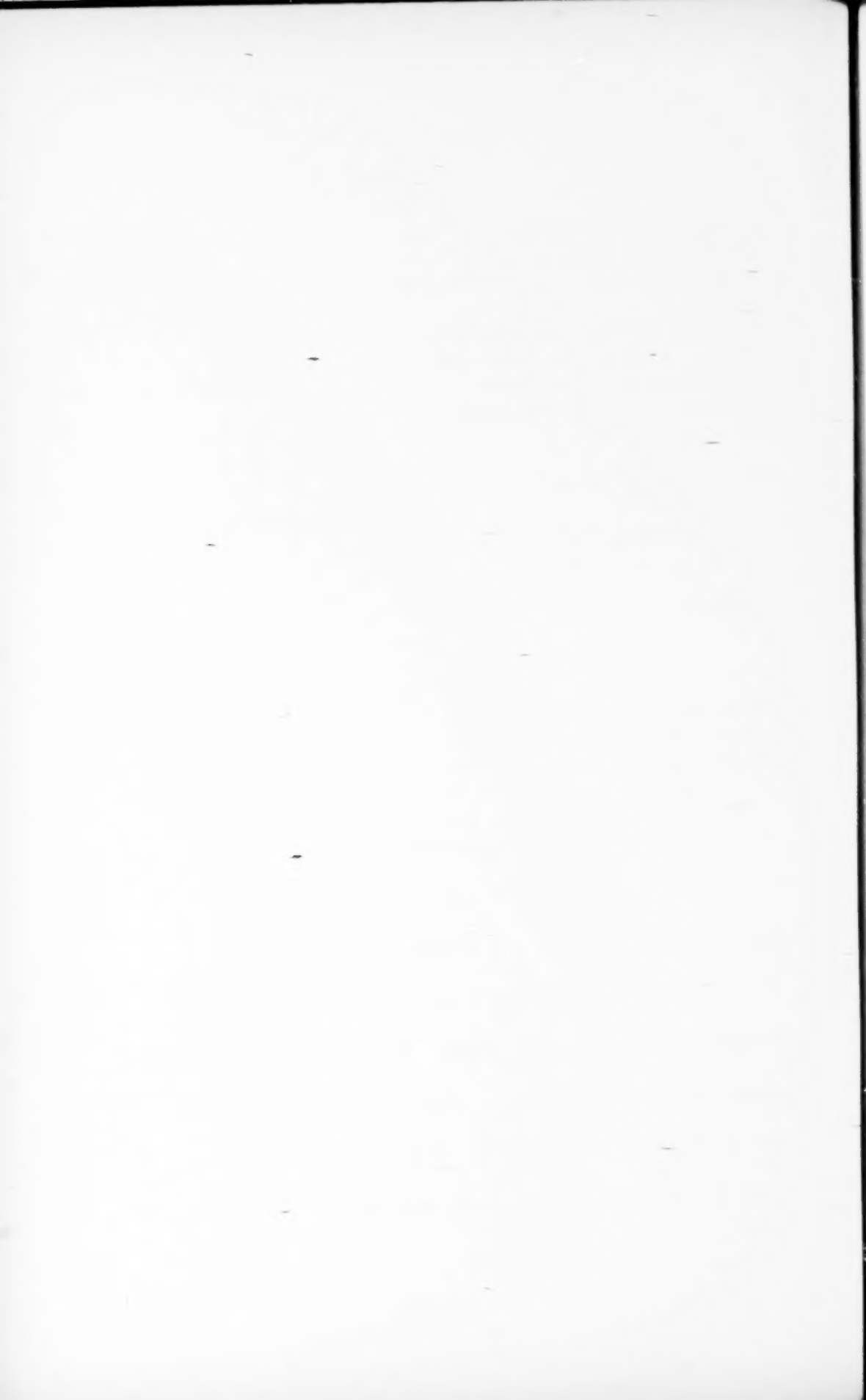
- against - :

ROBERT J. REED, et al, :  
Defendants. :

Estate of SIMON COHEN, :  
Application to Fix :  
Attorneys' Fees under :  
SCPA 2110 :

-----X

Plaintiff, Robert Cohen,  
having moved for an order pursuant to  
CPLR 321, directing that his attorney,  
Stephen Hochhauser, be relieved,  
determining his fee, determining the fee  
of a former attorney, Robert V. Shannon,  
and directing both attorneys to turn



over certain records, and said Stephen Hochhauser, having cross moved for advice and direction and for an order fixing his fee, and said Robert V. Shannon having cross moved for an order fixing his fee, and the matters having come before the Court, and after hearing argument of counsel and reviewing the affidavits and memoranda of law submitted by the various parties, having rendered a decision, dated August 2, 1982, directing the holding of a hearing on notice to all interested parties to determine whether an order should be made substituting Shoeman, Marsh, Updike & Welt as plaintiff's attorney, whether Robert Cohen is in a conflict of interest, and if so what corrective steps are to be taken, now, on motion of



Stephen Hochhauser, respondent pro se,  
IT IS -

ORDERED, that a hearing be held on October 4, 1982, before the Court, at the County Courthouse, 262 Old Country Road, Mineola, New York 11501, at 9:30 A.M., to determine whether an order should be made substituting Shoeman, Marsh, Updike & Welt as plaintiff's attorney, whether Robert Cohen is in a conflict of interest, and if so, what corrective steps are to be taken, and, IT IS FURTHER

ORDERED, that defendant Robert Reed or his attorneys, deliver to Plaintiff a current mailing list of the general and limited partners of Aljer Realty Company, Simon Cohen Company, Simon Cohen Real Estate and Management





Company, and Simon Cohen Realty Company,  
and, IT IS FURTHER

ORDERED, that within ten days  
after the date hereof, the plaintiff, at  
his own cost, shall mail a copy of the  
decision of the court, dated August 3,  
1982, together with a copy of the Notice  
of Hearing appended to the decision, to  
the general and limited partners at the  
addresses designated on the mailing list  
as supplied to plaintiff by defendant  
Robert Reed or his attorneys, and, IT IS  
FURTHER

ORDERED, that pending  
determination of the matters to be heard  
at the hearing, all other questions

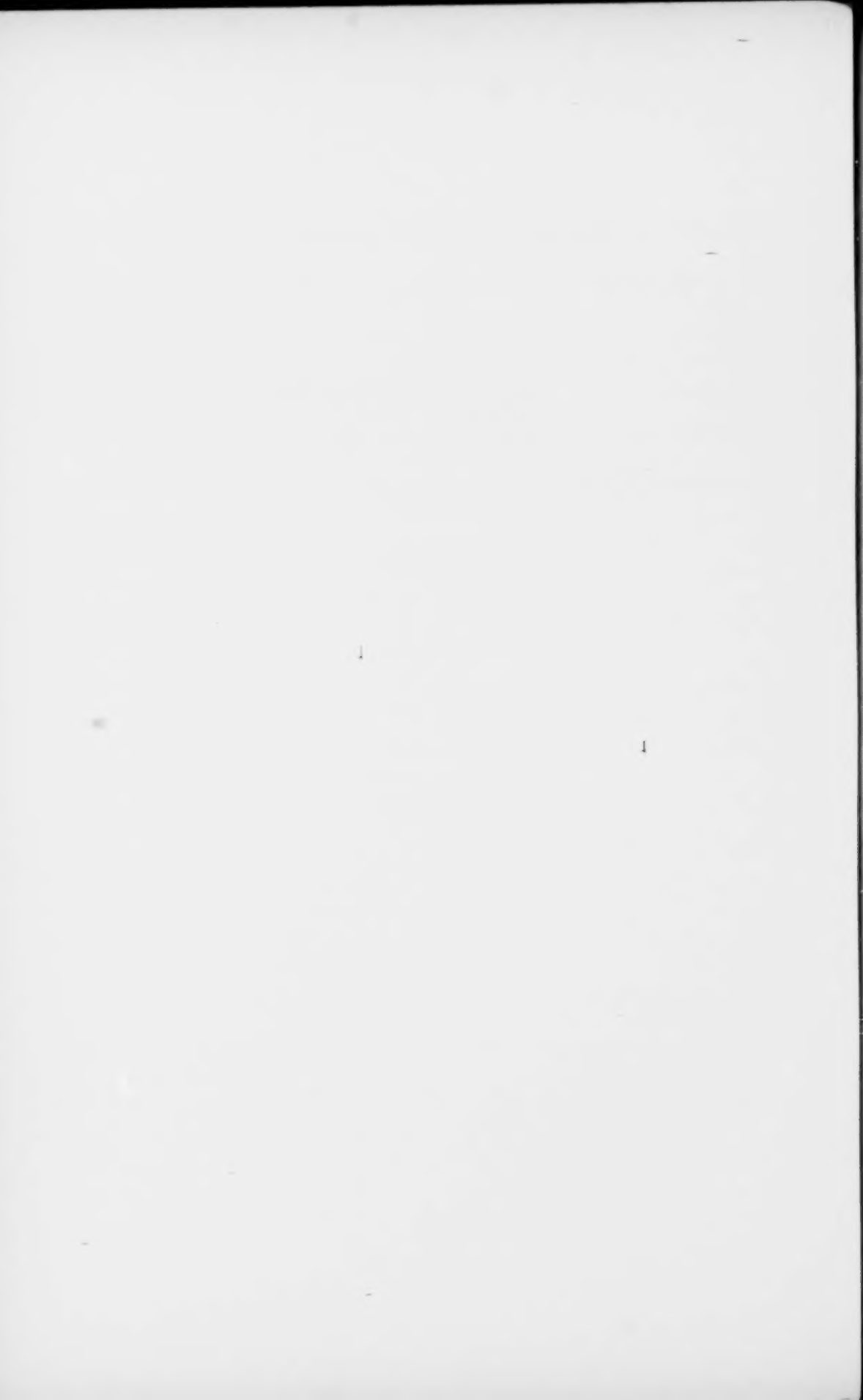


A170

raised in the motions and cross motions  
will be held in abeyance.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED August 17, 1982.]



APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X		
Robert Cohen,	:	
individually,	:	
appellant, et al.,	:	<u>DECISION</u>
plaintiff, v	:	
Robert J. Reed,	:	No. 7007
et al.,	:	
respondents.	:	
Estate of Simon	:	
Cohen (Application	:	
to fix attorney's	:	
fees).	:	
-----X		

Motion by appellant to stay the hearing  
scheduled to commence in the Surrogate's  
Court, Nassau County, on or about  
October 4, 1982, pending determination



of the appeal from an order of said court, entered August 17, 1982.

Motion denied.

GIBBONS, J.P., GULOTTA, BRACKEN & RUBIN,  
JJ., concur.

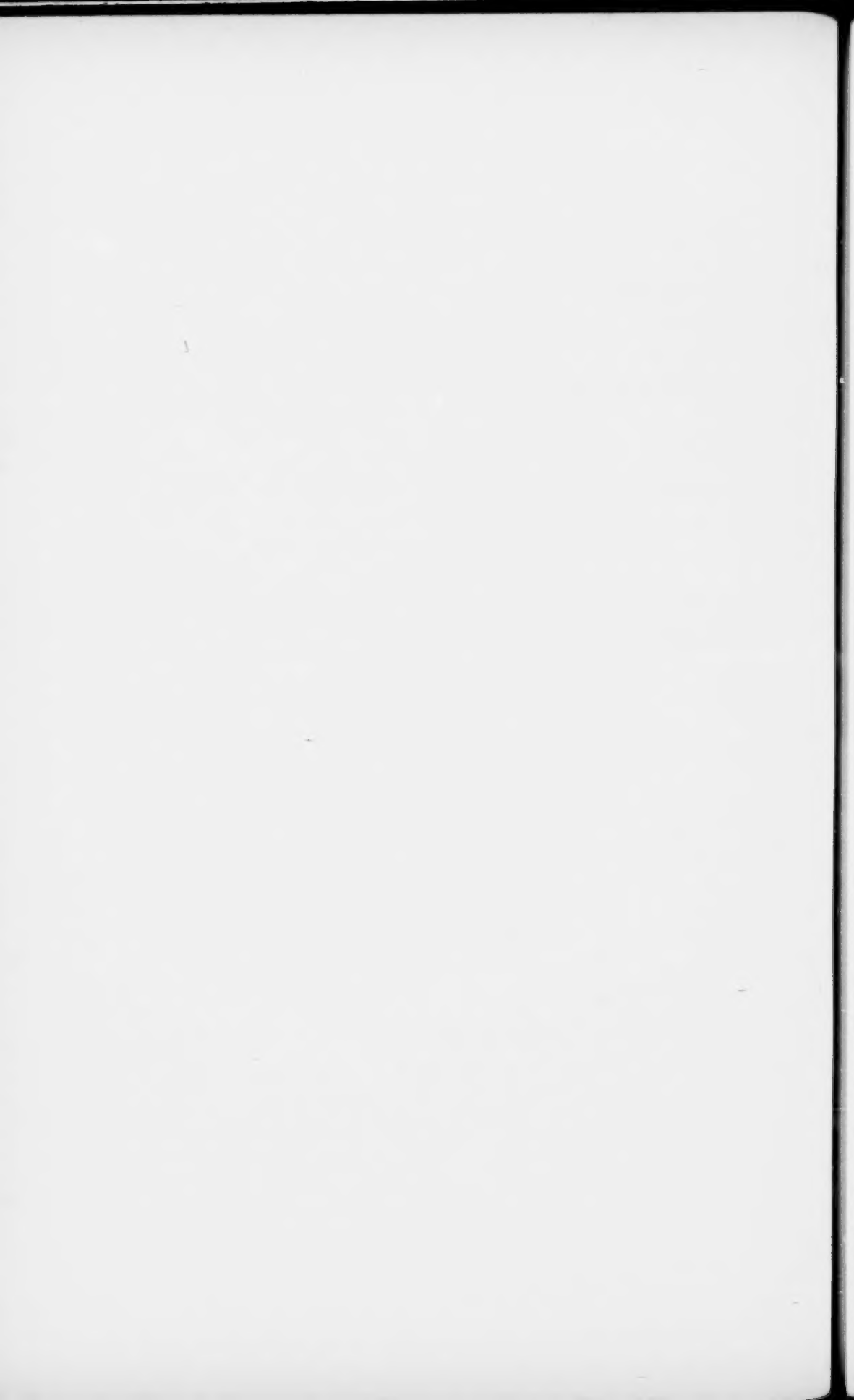
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September 30, 1982

No. 700

COHEN v REED:  
ESTATE OF  
SIMON COHEN





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real :  
Estate Co., et al., File No. 148704

: Dec. No. 194

Plaintiffs,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants,

:

Estate of Simon Cohen,

Application to Fix :

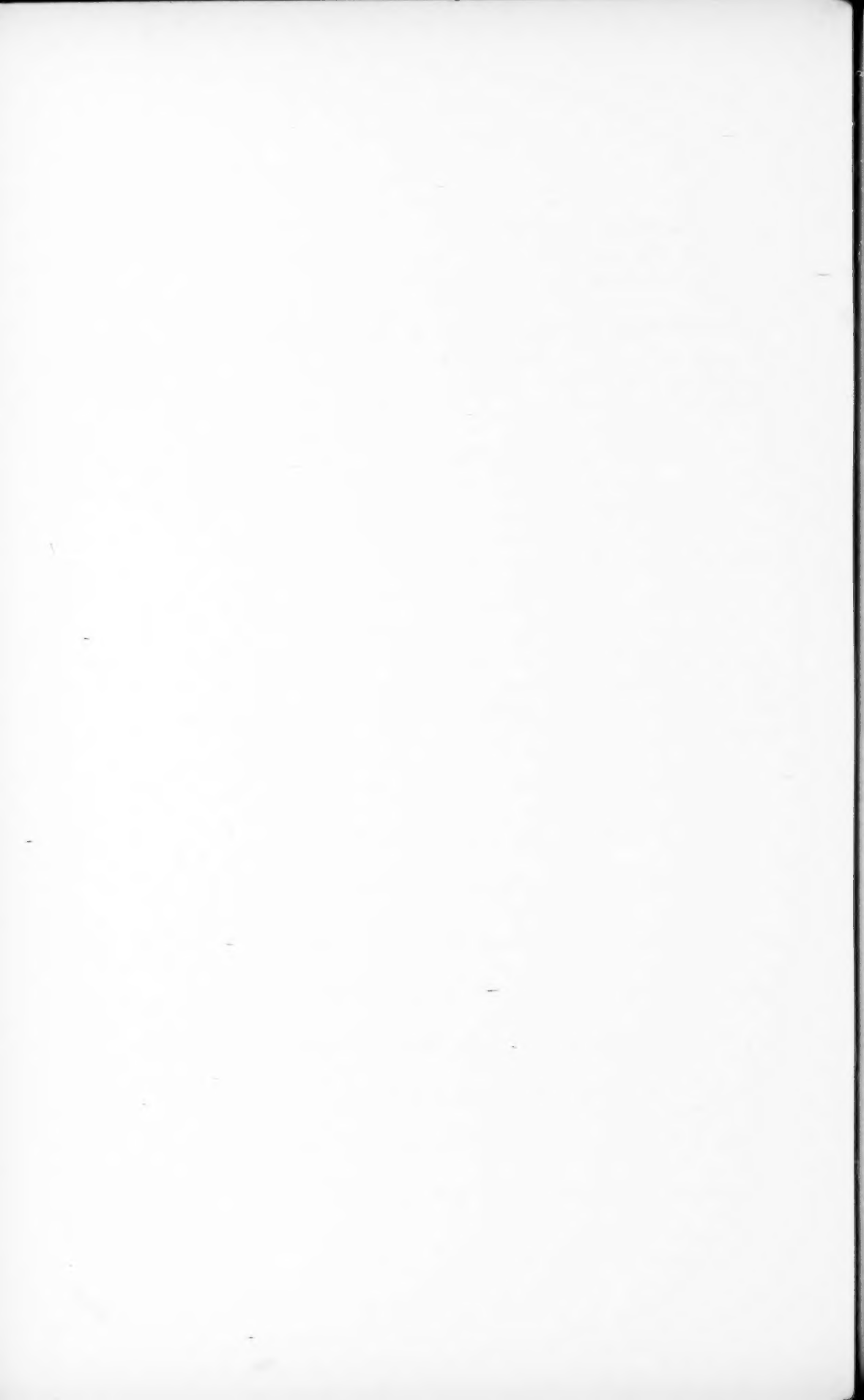
Attorneys' Fees under

SCPA 2110 :

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This is a motion by the  
plaintiff for an order directing that  
the court be disqualified on the grounds  
of personal bias and prejudice.

This action was commenced by  
the plaintiff, Robert Cohen,  
individually and derivatively on behalf  
of certain partnerships in which the



decedent Simon Cohen has an interest. The plaintiff contends that his father, Simon Cohen and other defendants siphoned monies from these partnerships and in addition diverted profits from the Mid-Island Hospital, Bethpage, New York, which profits were allegedly to be paid to one of the partnerships pursuant to a lease agreement. There are additional allegations, too numerous and complex to discuss here. The amended and supplemental complaint comprises seventeen causes of action sixteen of which were brought by the plaintiff on behalf of various partnerships and one of which was brought by the plaintiff, individually.

Lengthy discovery proceedings were conducted, in the midst of which the defendants moved for summary



judgment and dismissal. Judge Bennett, who was the Surrogate at that time denied the motions, without prejudice, pending completion of discovery. At the conclusion of the discovery proceedings the motions were renewed. This Judge, who was then the Chief Clerk of the Court submitted a referee's report which was confirmed by Judge Bennett in a decision dated November 28, 1979. The decision granted the motion to dismiss both the first and third causes of action and denied the motion as to the remaining causes of action. On reargument the court adhered to its original decision. The matter proceeded to trial before the Chief Clerk as referee. During the course of the trial, this Judge was elected to the position of Surrogate and the parties



consented to have him continue to hear the case.

At the time that this motion was made, the plaintiff was a few days short of resting his case and over fifty days of trial had been completed. At this point the plaintiff Robert Cohen moved for an order pursuant to CPLR 321 directing the substitution of Schoeman Marsh Updike & Welt as attorneys in place of Mr. Hochhauser, determining Mr. Hochhauser's fee and directing the turnover of books and records by his former attorney, Mr. Shannon and requested that his fee be determined. Mr. Hochhauser cross-moved for the same relief and in addition sought advice and direction from the court in connection with an allegation that the plaintiff was in a conflict of interest with other





partners on whose behalf the action was commenced. It is Mr. Hochhauser's contention that the plaintiff has frustrated settlement negotiations because of personal dislike for one of the defendants Mr. Reed, and refuses to accept any proposals which do not provide for his removal as Director of the Mid-Island Hospital even though the question of Reed's continuation is not an issue in this case.

Thereafter, Mr. Cohen brought on the instant motion for disqualification on the ground of personal bias. The following are some of the situations in which the plaintiff contends the court displayed bias and prejudice:

1. The court made erroneous rulings with respect to



discovery proceedings and declined to rule on certain matters at the time of the dispositions, requiring instead that formal motions be made;

2. the court failed to direct a substitution of attorneys and instead directed a hearing;

3. the court required the plaintiff to attend settlement conferences;

4. this action was delayed by the court resulting in added expense to the plaintiff;

5. the guardian ad litem's conduct in this case was inappropriate.



6. disparaging remarks about Mr. Cohen were made by the Judge to Mr. Shannon and directly to Mr. Cohen during a conference;

7. the decision dated August 2, 1982 indicates that the court is prejudiced against the plaintiff.

The plaintiff does not claim the Judge should be disqualified because of any pecuniary interest in the matter or consanguinity or affinity to any party in the controversy (Judiciary Law §14). Disqualification is sought solely on the basis of alleged bias and prejudice.

An application to disqualify a judge because of prejudice or bias as



distinguished from legal disqualification is addressed solely to the discretion of the judge (People v Patrick, 183 NY 52).

Turning first to the question of adverse rulings, the fact that the plaintiff does not agree with certain rulings made during the course of the trial is not a basis for disqualification. Adverse rulings standing alone do not establish judicial bias or prejudice (Berger v United States, 255 US 22), nor do they create a reasonable question of judicial impartiality (United States v Schwartz, 535 F2d 160, cert den 430 US 906). Such rulings are subject to correction on appeal as are any rulings made by this Judge as a referee during the course of examinations before trial.





The order directing that a hearing be held on the questions of substitution and conflict of interest is likewise subject to correction on appeal, and has indeed been appealed by the plaintiff to the Appellate Division. It was the court's opinion, after exhaustive research of cases involving derivative and class actions that the court, having been charged with the responsibility of protecting the rights of absent partners (see e.g. *Pettway v American Cast Iron Pipe Co*, 576 F2d 1157, cert den 439 US 1115) should apprise those partners of the status of the litigation and the issues raised by Mr. Hochhauser. Whether or not the court's decision was erroneous is a matter for the appellate review not a ground for disqualification. Addition-



ally, the court is hard-pressed to understand how its decision to refrain from determining the issues without giving all interested parties a chance to be heard, suggests any prejudice or bias against the plaintiff.

It is true that Robert Cohen was required to attend settlement conferences in an attempt to amicably resolve this matter. Mr. Cohen complains that it was necessary for him to travel from California to attend the conferences. Mr. Cohen is the plaintiff in this action commenced in the State of New York and he has made numerous trips to and from the West Coast for the purpose of attending the trial. In addition, an attempt was made to schedule the conferences at a time when Mr. Cohen was in New York. The need to



call Mr. Cohen in personally for conferences was occasioned by the fact that he had retained numerous attorneys to advise him with respect to the litigation, some of whom were never before the court and never attended any of the conferences. This seriously impeded the progress of the negotiations. Moreover, under the circumstances the court was wary of continuing with the negotiations without the presence of the plaintiff. In any event the Uniform Rules call for the presence of parties at pretrial conferences (22 NYCRR 1830.21).

Mr. Cohen further alleges that the decision dated August 2, 1982 indicates bias on behalf of the Judge in that it concludes that Robert Cohen has opposed certain settlement proposals

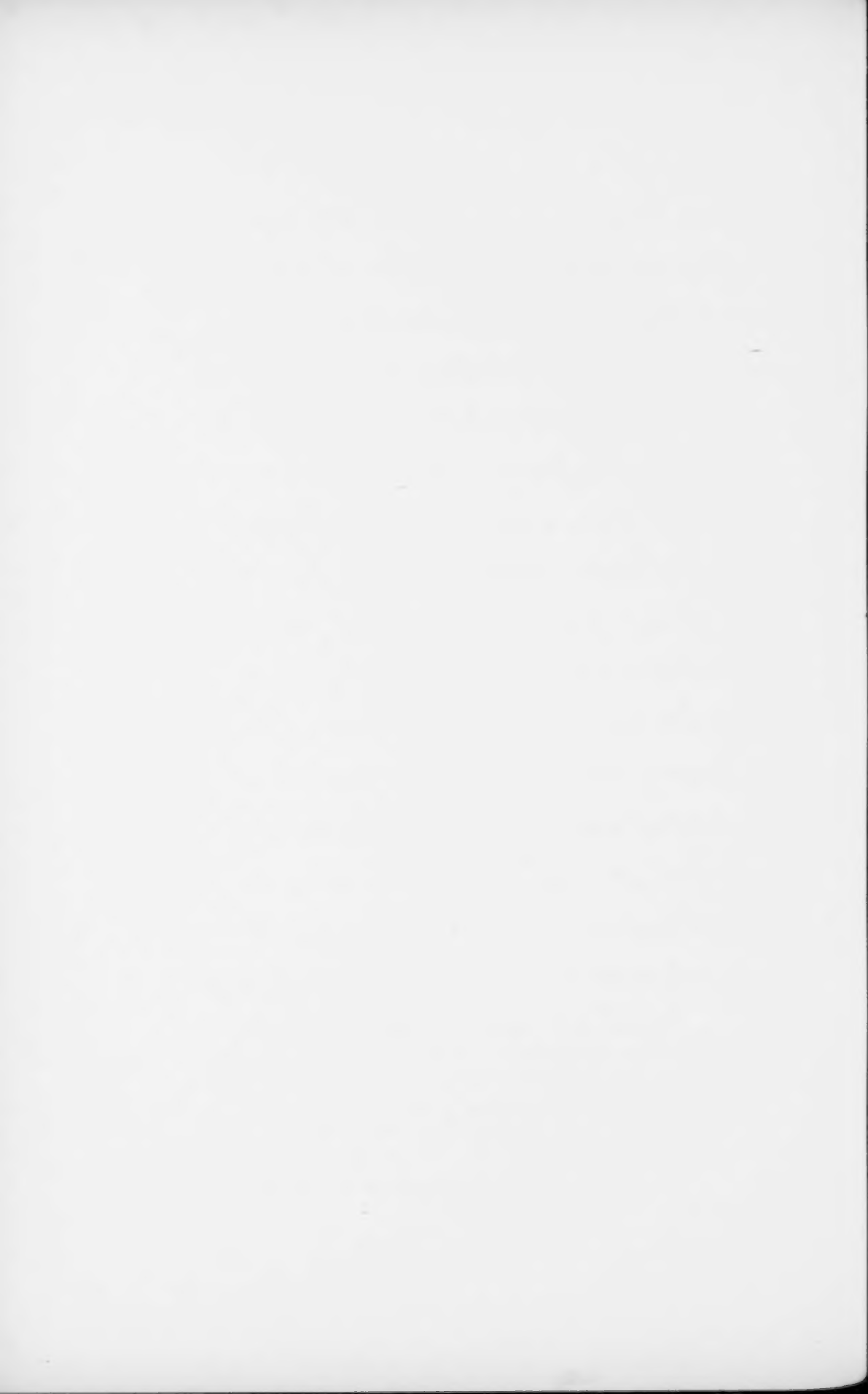


because they do not provide for the removal of Reed as Director of the Mid-Island Hospital. The plaintiff states that if this information was obtained from an "extrajudicial" source that would be sufficient ground for removal.

This court has not had any "extrajudicial" communication concerning this case. The conclusion set forth in the decision was arrived at not only by the position taken by Mr. Cohen in settlement negotiations but by the statements set forth in the plaintiff's affidavit in opposition of Mr. Hochhauser's cross-motion for advice and direction in which Mr. Cohen states:

"\* \* \* Reed is one of the defendants most directly involved with the extraordinary pattern of breach of fiduciary duty evidenced in this action. The court is familiar with the





extraordinary ingenuity of many of the schemes employed to siphon funds out of the hospital and to deprive the respective partnerships of their rightful income. Given that extraordinary history, it could not possibly be in the interests of the plaintiffs to continue Mr. Reed in direct control of the sole source of income of the partnership entities and without any finding of liability for the clear misconduct of the post.

10. I have carefully considered that the proposed settlement provides for the estate, for my personal trust, for the appointment of additional general partners for the partnerships and for certain auditing rights and other procedural benefits. However, these protections do not by any means assure that the tortious history of Mr. Reed will not continue. In a real sense, the settlement merely erects fences around the chicken coop but leaves the fox inside.

\* \* \*

A judge should not disqualify himself on the basis of conclusions



learned from his participation in the case as distinguished from "extrajudicial" knowledge (Wolfson v Palmieri, 396 F2d 121) particularly where the facts are gleaned from the affidavit of the party who seeks the disqualification.

The court does not feel that the allegations made in connection with the conduct of the guardian ad litem for certain infant beneficiaries of the estate, or alleged delays in the proceeding, support a motion for disqualification.

Lastly, we turn to the allegation that the Judge confronted Mr. Cohen's former attorney Mr. Shannon and that the following conversation took place in "words or substance":



"Judge Radigan: 'I don't want to allow Cohen in the Hospital. I think Cohen is a disruptive force and I am reluctant to give him continued access to the Hospital'.

Mr. Shannon: 'But Judge if you find fraud how can you prevent it?'

Judge Radigan: 'Well then, perhaps I can't find fraud.'"

(This encounter was allegedly relayed by Mr. Shannon to Robert Cohen although there is not supporting statement by the former attorney corroborating this conversation).

Whether or not such a statement reflects a bias against the plaintiff is a question which need not be addressed since the conversation never took place. No such statements or any similar statements were ever made by this Judge. There is therefore no occasion to discredit its veracity

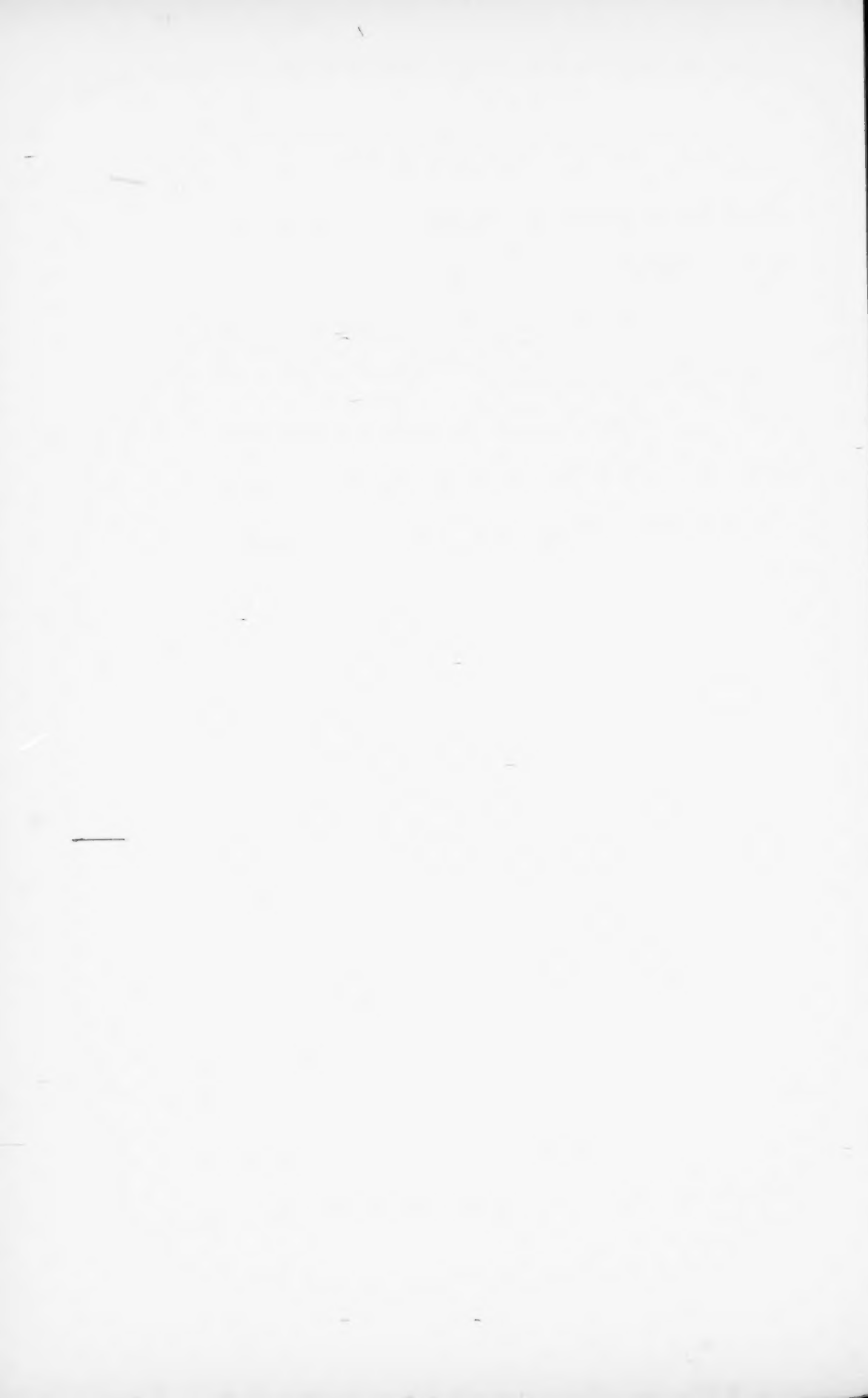


observing that Mr. Cohen's charge is based merely on hearsay (see *Hodgson v Liquor Salesmen U Loc No 2 of State of N Y*, 444 F 2d 1344).

The court is aware that not only actual bias or prejudice but even the appearance of prejudice on the part of a judge must be avoided (*Corradino v Corradino*, 48 NY 2d 894). However, this rule should not extend to a situation where remarks attributed to a judge were never uttered. If a judge were compelled to recuse himself in every such case, any party to a proceeding could cause the transfer of a case to another judge because of dissatisfaction with rulings or decisions made by the court.

With respect to the statements made about appointing a guardian ad





litem for Mr. Cohen, the technical and hypothetical question of Mr. Cohen's capacity to evaluate any settlement proposal was raised by Mr. Cohen's attorney, Mr. Hochhauser during a conference. In response to Mr. Hochhauser's possible concern about his client, the Judge replied that in the event Mr. Cohen required assistance, a guardian ad litem could be appointed for him. This was a response to a purely procedural question, which the court felt the responsibility to answer, and not an expression of a personal opinion as to whether Mr. Cohen was capable of managing his own affairs.

It is noted that this motion was brought on shortly after the decision dated August 2, 1982, with which the plaintiff disagrees, even



though the alleged conversation between Mr. Shannon and the Judge is said to have taken place in December, 1981 and notwithstanding no motion to recuse was made. Additionally following the allegedly prejudicial rulings made by the judge as referee during the course of pretrial examinations, the plaintiff consented to have the Judge continue to preside over the case.

Where a judge is satisfied that no bias or prejudice exists, he is under an obligation to preside even when challenged (Matter of Robin O, 80 Misc 2d 242; Matter of Natter, 70 Misc 2d 791).



A191

The application is denied.

Dated: October 1, 1982.

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	NOTICE OF
ually and as a partner	:	SETTLEMENT
of Simon Cohen Real	:	<u>OFFER</u>
Estate Co., Inc.,	:	
	:	File No. 148704
Plaintiff,	:	Dec. No. 38
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants,	:	
	:	
ESTATE OF SIMON COHEN	:	
	:	
-----X	:	

NOTICE OF SETTLEMENT OFFER

This proceeding commenced by Robert Cohen, individually and on behalf of certain partnerships, having been transferred from the Supreme Court, Nassau County, is now pending in the Surrogate's Court, Nassau County.





DESCRIPTION OF LITIGATION

The amended and supplemental complaint alleges seventeen causes of action, sixteen of which are brought derivatively on behalf of the following partnerships: Simon Cohen Real Estate and Management Company (SCREAM); Simon Cohen Company (SCC); Simon Cohen Realty Company (SCR); and Aljer Realty Company (Aljer). The defendants are the various partnerships; the executors of the estate of Simon Cohen individually and in their fiduciary capacities as executors, and in some cases as general partners in the various partnerships; William B. F. Werner; Mid-Island Hospital (M-I-H); Juan Soto; Elaine Wilschek; Sheldon Katz; Judah Feinerman; J. S. K. Cleaning Services, Inc.,



Jasdane, Inc.; Volume Feeding, Inc.;  
DADGAB, Inc; and Brimsco, Inc.

The following is a general summary of the causes of action and is not intended to be all-inclusive.

The first cause of action concerns a sublease between M-I-H and SCREAM and alleges that the negotiations between M-I-H and SCREAM for a sublease which allegedly provided that SCREAM would be entitled to 100% of the rents and profits of M-I-H inadvertently omitted a provision which would have provided for inspection of M-I-H's books and records. A reformation of the sublease is sought. The second cause of action brought on behalf of SCREAM alleges that the omission with respect to the inspection and audit was a product of fraud. The third cause of

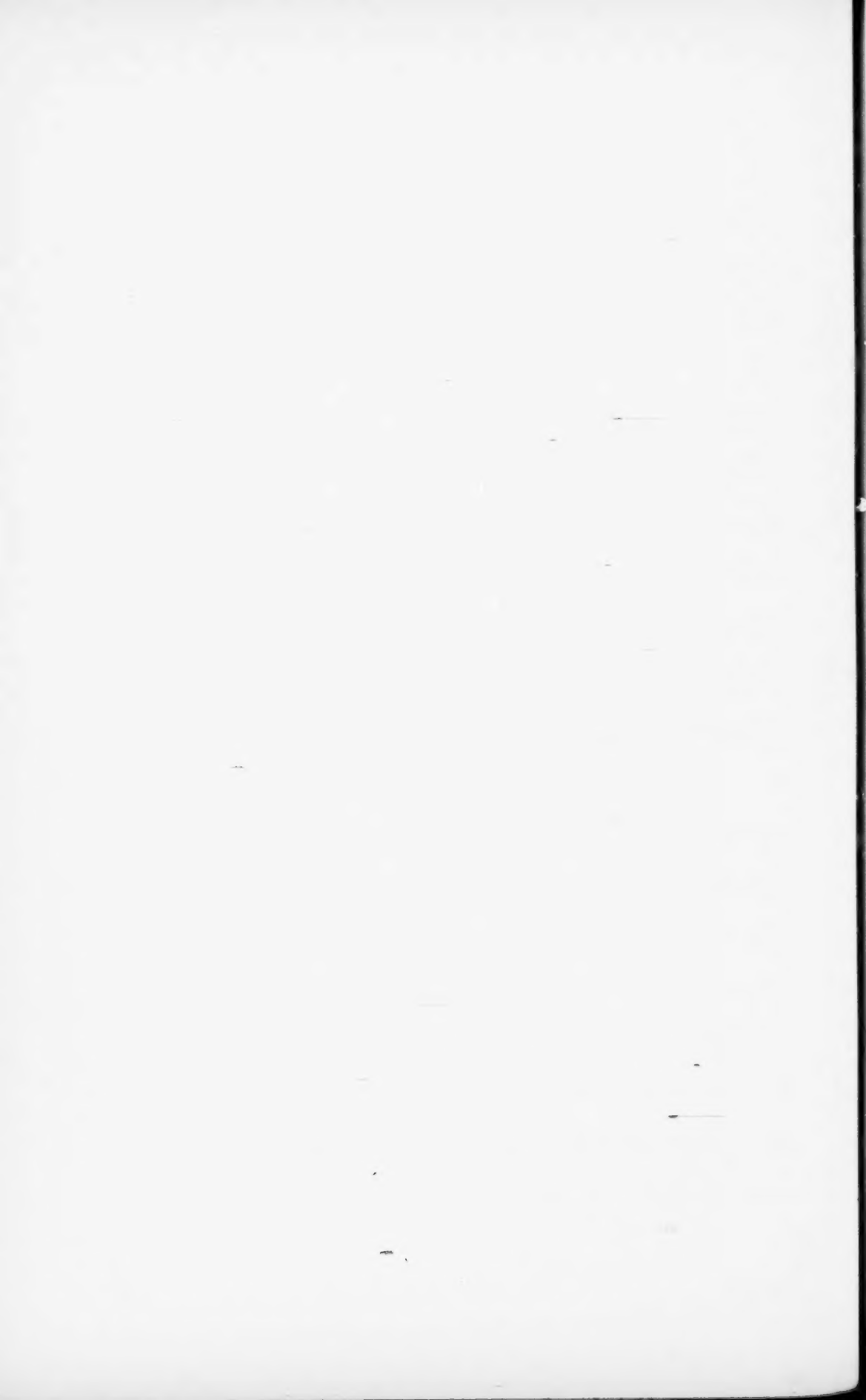


action is a claim that the sublease impliedly gives a right of inspection and audit.

The fourth cause of action on behalf of SCR alleges that Simon Cohen made unauthorized withdrawals from SCR. The fifth cause of action alleges that Reed, Hackell, Potter, Citibank and Werner-M-I-H aided and abetted Simon Cohen in carrying out and concealing the wrongful withdrawals.

The sixth cause of action concerns the alleged failure of the executors to inform the SCR partners of the alleged wrongdoing.

The seventh cause of action brought on behalf of SCREAM alleges that Simon Cohen made wrongful withdrawals from SCREAM for his personal use. The eighth cause of action concerns alleged



wrongful acts by Reed in connection with repayment of alleged loans from SCREAM TO Simon Cohen. The ninth cause of action alleges that Simon Cohen, with Reed's assistance, permitted Werner-M-I-H to enter into contracts with various businesses as a result of which Werner-M-I-H paid substantially greater sums for services which had previously been performed by its employees and that this resulted in a loss of revenues to SCREAM. The tenth cause of action alleges that some of the defendants knew and participated in the alleged scheme to defraud SCREAM. The eleventh cause of action alleges that Reed wasted the assets of SCREAM.

The twelfth cause of action alleges that Reed wasted the assets and mismanaged SCR.





HISTORY OF LITIGATION

The original complaint in this action was served in 1971. An amended and supplemental complaint was served in August, 1974. The defendants moved for an order dismissing each cause of action and an order granting summary judgment. The court reserved decision to allow the parties to exhaust all discovery devices. Following the completion of discovery reargument of the motion for summary judgment was made before the Hon. C. Raymond Radigan as Referee. In a report dated August 22, 1979 he recommended that the motion for an order granting summary judgment be denied and the motion for an order dismissing the first and third causes of action be granted and that the motion for an order dismissing each of the remaining causes



of action be denied. The report was confirmed by Surrogate Bennett in a decision dated November 28, 1979.

The trial commenced before the Hon. C. Raymond Radigan as Referee. Thereafter, the parties consented to have the case continue before him as Surrogate of Nassau County. Currently, more than fifty days have been occupied at trial. Towards the end of the plaintiff's case the plaintiff, Robert Cohen, filed a motion requesting that Mr. Hochhauser be discharged as plaintiff's attorney, that his fee be determined and that he be required to turn over books and records in his possession. Mr. Hochhauser made a cross-motion for advice and direction stating that Mr. Cohen has obstructed settlement negotiations because he was



motivated by personal animosity towards Mr. Reed and would not accept any proposal which did not provide for the removal of Mr. Reed as executive director of M-I-H. Mr. Hochhauser further states that Mr. Cohen is in a conflict of interest as nominal plaintiff in the derivative suits. In its decision dated July 30, 1982 the court determined that the limited and general partners of Aljer, SCREAM, SCC and SCR should be apprised of (1) the status of the negotiations in this matter; (2) the application for an order substituting counsel; and (3) the question raised as to a possible conflict of interest.



The plaintiff was directed to mail a Notice of Hearing to the partners informing them that a hearing would be conducted on October 4, 1982 at 9:30 a.m. at the Surrogate's Court, Mineola, New York, and that any person who wished to be heard should appear in person or by counsel.

In a decision dated October 1, 1982 the court denied Mr. Cohen's motion for recusal.

Thereafter a hearing was conducted and the three issues outlined above were submitted for decision, as was the plaintiff's motion for a stay of this proceeding and Mr. Hochhauser's cross-motion for a stay of proceedings pending in any other court.

In the interim, further settlement negotiations were conducted





at which time Mr. Cohen submitted a proposed settlement agreement. Some of the defendants then submitted a counter-proposal.

A further conference was held in which the Surrogate informed the parties that a notice of settlement incorporating the essential terms of the defendants' offer would be forwarded to the partners. The purpose of this notice is to inform the partners of the terms of the settlement which have been suggested and to afford them an opportunity to inform the court whether they consent to the proposal as being the minimal terms which they would accept or object to the terms of the settlement. Attached is a copy of the proposed settlement.



This notice does not suggest any approval of the proposed settlement by the court which would ultimately determine whether the proposed settlement terms are reasonable.

If the court finds that any of the attorneys are entitled to fees for services rendered on behalf of the partnerships some or all of the fees plus disbursements and expenses may be deducted from the amount of the recovery paid to Robert Cohen as reimbursement or directly to the attorneys.

Any partners who choose to take a position with respect to the terms set forth in the notice must respond directly to the court in writing on or before February 16, 1983 at the following address: Surrogate's Court,



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	
Estate Co., et al.,	:	File No. 148704
	:	Dec. No. 421 & 42
Plaintiffs,	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants,	:	
	:	
Estate of SIMON COHEN,	:	
Deceased. Proceedings	:	
to Fix Attorneys Fees	:	
and for Advice and	:	
Direction under SCPA	:	
§2110.	:	

-----X

This is a transferred Supreme Court action was commenced by the plaintiff, Robert Cohen, individually and derivatively on behalf of certain partnerships in which the decedent had an interest. Generally, the plaintiff alleges that the defendants fraudulently



deprived the partnerships of assets. A central issue in the case is whether Simon Cohen Real Estate and Management Company was deprived of profits which it was allegedly entitled to receive from the Mid-Island Hospital pursuant to an agreement. During the pendency of the proceeding and at a point when the plaintiff was approaching the close of his case, the plaintiff moved pursuant to CPLR 321 for an order directing that Mr. Hochhauser be removed as plaintiff's attorney, that his fee be determined and that his fee be determined and that the fee of former attorney, Mr. Shannon, also be determined. Mr. Hochhauser cross-moved for advice and direction concerning Mr. Cohen's alleged inability to continue as a representative





plaintiff because of a conflict of interest.

Mr. Hochhauser took the position that it was his responsibility as attorney for the various partnerships to bring to the attention of the court what he believed to be a personal animosity on the part of Mr. Cohen towards one of the defendants, Mr. Reed. It is contended by Mr. Hochhauser that due to a personal dislike for Mr. Reed, Mr. Cohen refused to accept any settlement proposals which did not provide for the removal of Mr. Reed as executive director of the Mid-Island Hospital, and that these refusals were not in the best interests of the other partners.

In a decision dated August 2, 1982 the court determined that the



allegation of conflict of interest was sufficient cause for the court to exercise its power to conduct an inquiry where the interests of partners not actively participating in the action might be jeopardized (see Pettway v American Cast Iron Pipe Co., 576 F2d 1157, cert den 439 U.S. 1115). It was determined that a hearing on the conflict of interest question should be conducted and that the questions relating to substitution of counsel and attorneys' fees would be held in abeyance. Additionally, the court directed that a Notice of Hearing and a copy of the August 2, 1982 decision be forwarded to all of the partners on whose behalf the action was commenced and that the Notice should apprise the



partners of the issues and status of settlement negotiations.

The plaintiff was directed to forward the Notice and a copy of the court's decision to the partners. It subsequently became apparent that the information was sent, accompanied by various materials (including letters which reiterated the plaintiff's position as to settlement), none of which had been authorized by the court.

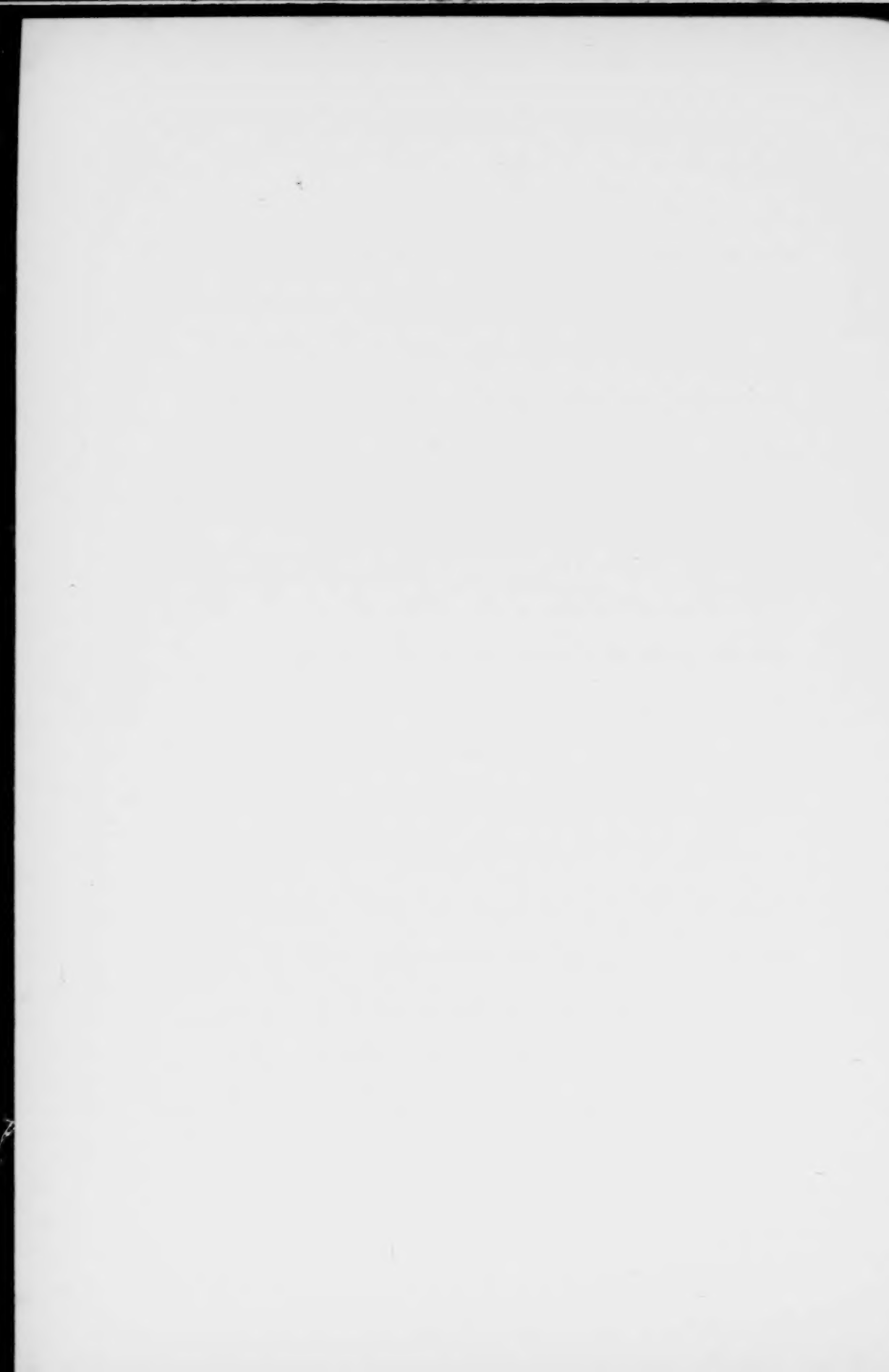
Thereafter the plaintiff made a settlement offer and the defendants a counter-offer and it was determined by the court that the partners should receive a new Notice informing them of the current status of the litigation, including a copy of the defendants' settlement offer. The partners were directed in the Notice to respond in



writing to the court indicating their acceptance or rejection of the offer on or before February 16, 1983.

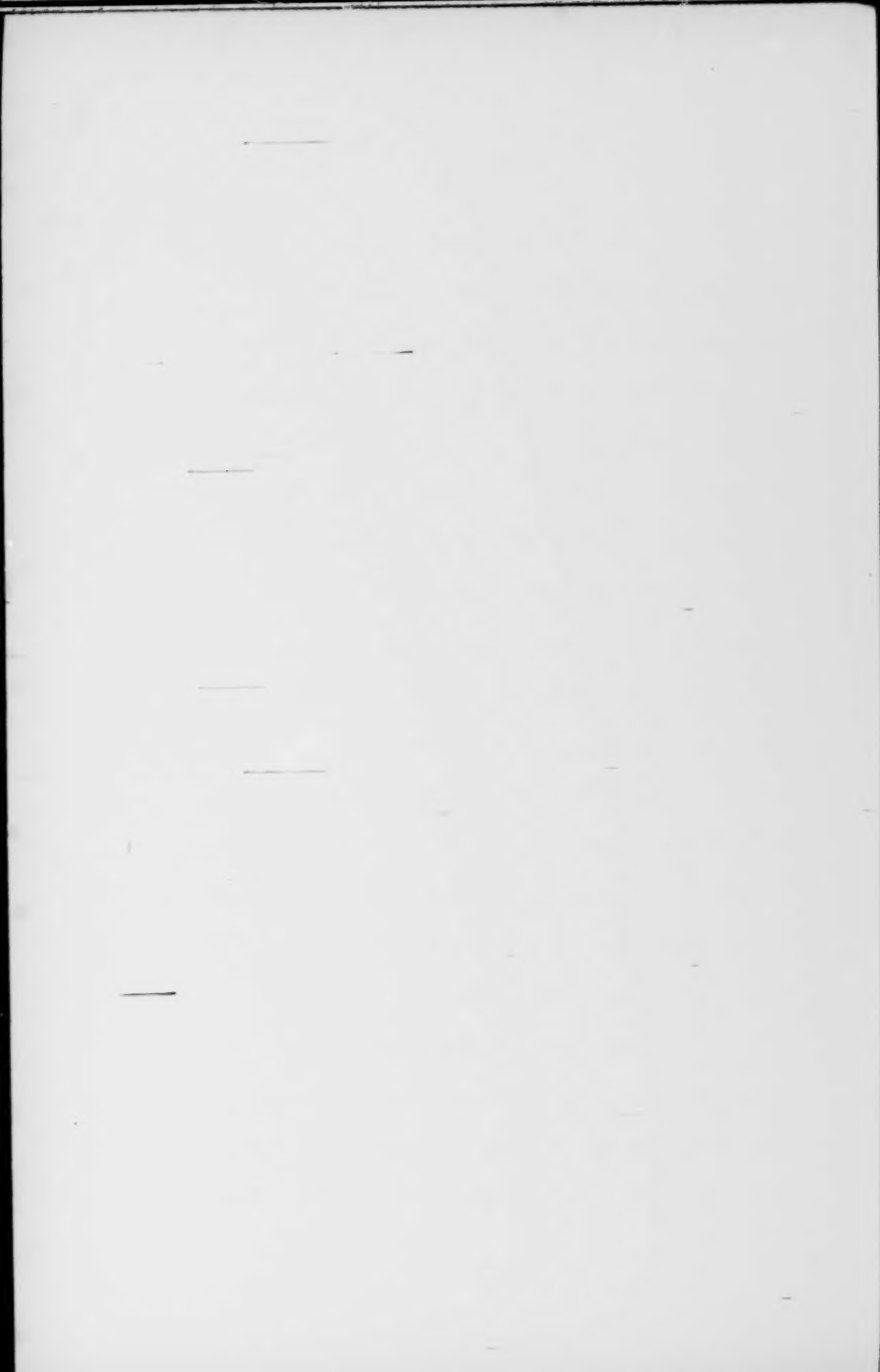
In the interim, the plaintiff moved for an order directing a stay of the proceedings in this court as to the issues raised by the motion pursuant to CPLR 321, pending a determination in the United States District Court in an action by the plaintiff against Mr. Hochhauser for damages arising out of alleged misconduct by Hochhauser as an attorney in this proceeding. Hochhauser cross-moved for a stay of the federal action, although he contends that as of October 6, 1982, the date of his affidavit, no complaint had been served. Both the motion and cross-motion for a stay will be decided herein.





At the hearing on the question of disqualification Mr. Cohen was represented by his own attorney, Mr. Schoeman. Mr. Schoeman objected to certain questions on the grounds of attorney-client privilege. The court ruled that Cohen could be compelled by the "class" attorney to testify to communications with his attorneys. The nominal plaintiff and the partners are in the position of clients who consult an attorney for their mutual benefit and, therefore, there is no privilege as between the partners and Cohen (*Oursler v. Armstrong*, 10 Misc 2d 654 affd 8 AD2d 194 app dsmd 6 NY2d 998).

Additional questions concerning the privilege were raised by the defendants who contended that they were entitled to be present during the



entire hearing and that the plaintiff had waived any privilege which attached to communications with his attorneys by prior disclosures.

At various times during the hearing the defendants were excluded and the record was sealed pending a decision as to possible waiver of the attorney-client privilege and relevancy.

I

The disclosures in question may be categorized as follows: 1) Letters prepared by Cohen; 2) Descriptions of communications between Cohen and Hochhauser which were incorporated into Cohen's pleadings; 3) Letters from Hochhauser to Cohen which were annexed as exhibits to the plaintiff's pleadings; and 4)



Communications between Hochhauser and Cohen which were revealed to the partners and a third party.

Letters Prepared by the Plaintiff

It is contended that a letter dated February 12, 1982 prepared at the direction of Hochhauser by the plaintiff concerning proposed terms of settlement is discoverable by the defendants.

Mr. Hochhauser asserts that the plaintiff prepared the letter with the intention of submitting it to the court and therefore the letter is not privileged. Cohen objects to disclosure.

The attorney-client privilege afforded by CPLR 4503 applies to communications originating from the client as well as communications from



attorney to client (DeLong v. Siebrecht, 196 AD 74; Matter of Van Gorder, 10 Misc 2d 649). The privilege extends not only to oral communications but to communications in writing (DeLong v. Siebrecht, supra).

It is well established that agency is not within the scope of the lawyer's professional employment and consequently proof of agency or instructions to deliver a document are not privileged (Matter of Creekmore, 1 NY2d 284; Rosseau v. Bleau, 131 NY 177). Likewise, the contents of the document are not privileged where it is intended by the client that they be imparted to another (Brown v. Ingersoll, 226 NYS2d 479). This includes matters which are disclosed during settlement negotiations to opposing counsel or to a third party





(8, J. Wigmore on Evidence [3rd Ed.]  
§2325).

In the instant case, however, the letter was prepared by the plaintiff at the direction of his attorney and was addressed to the attorney. The circumstances surrounding the preparation of this document presupposes that it was the client's intention to consult with his attorney and obtain his legal advice as to these items. This conclusion is supported by the fact that the document was never delivered to the court at the insistence of the attorney. The court therefore concludes that the letter and the discussions between Mr. Hochhauser and Mr. Cohen concerning the letter are communications which are protected by the attorney-client privilege and that the privilege was not



waived. The same conclusion is reached with respect to the May 27, 1981 letter to the Court, which was never mailed, and the February 23, 1982 letter.

Communications Related in Pleadings

It is asserted that Cohen waived the attorney-client privilege by statements made in his affidavit in opposition to the cross-motion for disqualification and by attaching to the affidavit a copy of the September 8, 1981 letter which evaluates the success of each cause of action and evaluates certain settlement proposals. A party may waive the attorney-client privilege by furnishing a privileged communication to his adversary (*Mut. Ins. Co. v. Engels*, 21 AD2d 808; *Matter of Saxl*, 27 Misc 2d 658).



Cohen's recitation of his position with regard to Reed's removal does not, standing alone, constitute a waiver of the attorney-client privilege. In the affidavit Cohen states his opinion, but does not reveal any confidential communications.

The September 8, 1981 letter is an item which comes within the attorney-client privilege (CPLR 4503) and is therefore protected from disclosure (CPLR 3101[b]) unless the privilege is waived. By making the letter public the privilege was waived as to that particular item. A further question arises as to whether the privilege was waived as to other items concerning the same subject matter.

The general rule is that, where a party discloses privileged

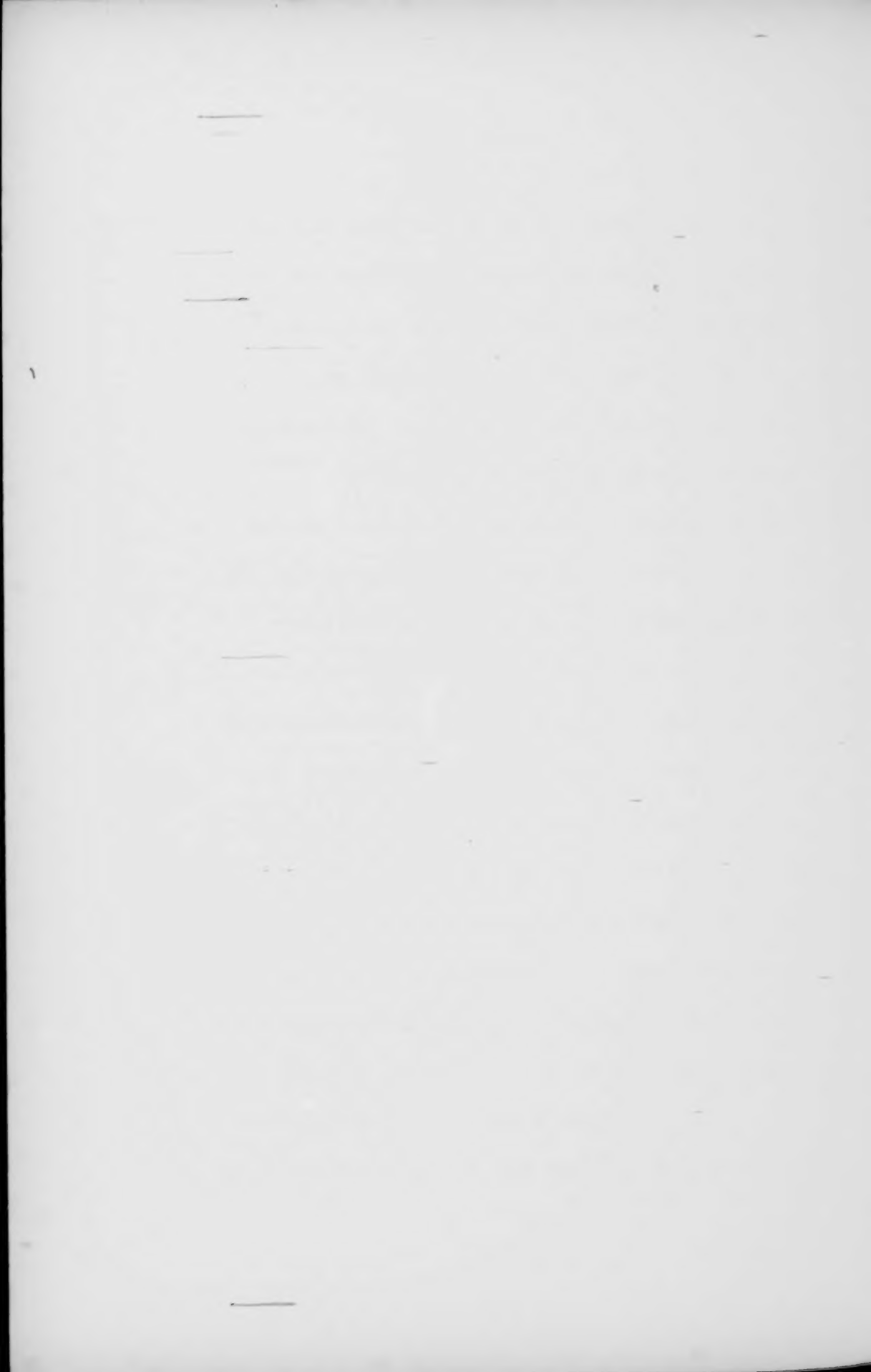


communications as to a certain subject matter, he waives the privilege as to communications on the same subject.

However, the weight of authority supports the view that where the attorney and client become adversaries, a different rule applies. In a controversy between themselves as to compensation or where the client questions the adequacy of representation the privilege is waived so as to permit the attorney and client to defend his rights (McCormick on Evidence [2nd Ed.] §91). This rule applies not only to independent litigation between the attorney and client, but litigation between the client and third parties as well (McCormick on evidence, supra).

In New York recognition has been given to the fact that it would be





unfair to the client to permit the waiver of the privilege in an attorney-client dispute to be extended to a dispute between the client and third parties (*Matison v. Matison*, 95 NYS2d 837 affd 97 NYS2d 550 [waiver of privilege did not extend to subsequent actions with third parties]).

The adequacy of the attorney's services is an issue which relates to the question of substitution but has not been injected as an issue in the main case (cf. *Matter of Hart*, supra [allegation that waiver of right of election not made knowingly]).

Accordingly, the court finds that with respect to the items set forth in Cohen's affidavit in support of the substitution motion and the exhibits annexed thereto, the privilege was not



waived so as to permit disclosure of other communications protected by the attorney-client privilege.

Additionally, the statements made in plaintiff's affidavit in support of the motion for recusal do not constitute a waiver of the privilege with the exception of items (A), (B), (C) and (D) on page 2 of the letter dated February 23, 1982, which deals with the same subject matter addressed in the affidavit. However, these items concern only trial strategy and are clearly not material and necessary to the defendants in the main case.

Communications from Plaintiff to  
Partners and Third Parties

The plaintiff concedes that following the court's direction that notice of the hearing be forwarded to



the partners, he forwarded such a notice accompanied by a packet of information which included 1) a copy of the September 8, 1981 letter; 2) a copy of a letter from plaintiff's California lawyer to Robert Reed; 3) a copy of a letter (July 22, 1972) from Robert Cohen to the decedent's grandchildren (not forwarded to all partners]; and 4) a copy of a letter dated July 19, 1982 from Cohen to the partners, which reveals hit attorney's advice as to acceptance of settlement offers.

The defendants contend that since the information disclosed to all of the partners was not restricted to specific causes of action, the privilege was waived. For example, the partners of Simon Cohen Real Estate and



Management Company received information concerning Simon Cohen Realty.

The disclosure of Hochhauser's communications to all of the partners may not in itself constitute a waiver of the privilege since the disclosure was to co-parties (see Burlington Industries v. Exxon Corp., 65 F.R.D. 26) who were represented by the same attorney.

However, it is not necessary to explore this aspect of the question in any detail. The forwarding of the information to the guardian ad litem representing an infant grandchild of Simon Cohen, in her capacity as a beneficiary of the estate, constituted a waiver of the attorney-client privilege (as well as work product exception). However, the waiver of the privilege as





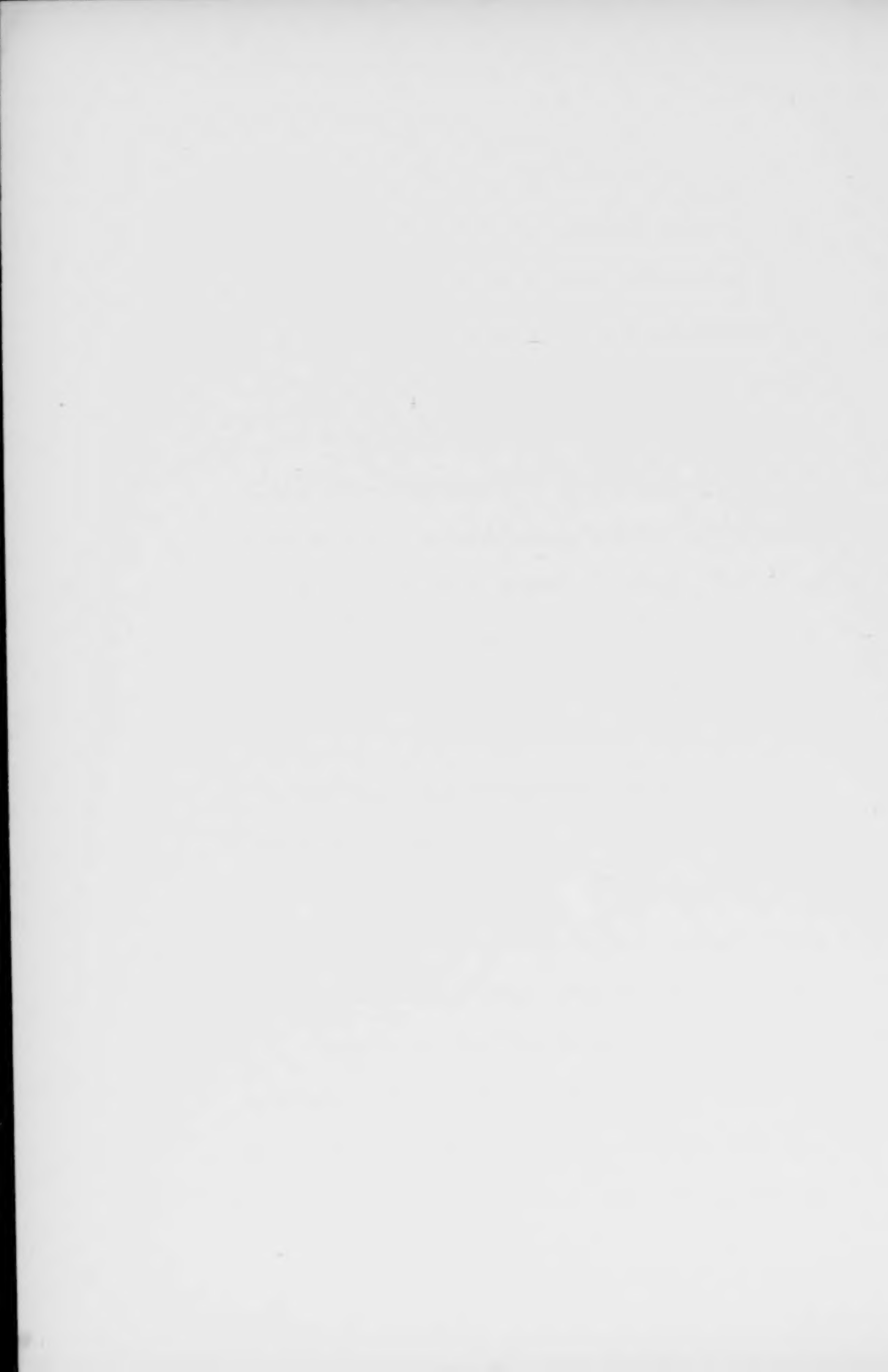
to those documents does not trigger the right to further disclosure of the testimony or other documents in evidence.

The scope of Mr. Hochhauser's testimony was very wide, encompassing the details of his trial strategy, drafting<sup>1</sup> of the complaint and his personal thoughts with respect to various aspects of the case, which may not have been disclosed to his client and which spanned a period of years. With the exception of a brief reference to the advisability of settlement (Transcript p. 340), there were no specific communications divulged by Mr. Hochhauser concerning the advisability of accepting the settlement offer or an evaluation of the probabilities of success on the



individual causes of action. The testimony of Robert Cohen is similarly unrevealing as to those issues with the exception of Cohen's acknowledgement that Hochhauser stressed certain provisions of the settlement and the effect of those provisions (Transcript pp. 105, 106). There were no other communications which were testified to which were of the same subject matter as the prior disclosures.

The testimony and exhibits should remain sealed not only because it was in part privileged and in part not privileged (such as the conversation between Hochhauser and Cohen in the presence of the guardian ad litem [Transcript p. 105]), but also because the defendants have failed to show the materiality and necessity of disclosure



(CPLR 3101). Moreover, the defendants have no direct interest in the outcome of this hearing, the issues raised being internal matters concerning the partners alone.

## II

Turning now to the merits, it is Mr. Hochhauser's contention that the plaintiff has a personal animosity towards Mr. Reed, and that his personal feelings toward Reed have placed him in a conflict of interest with the other partners. Specifically, it is contended that because of his personal feelings Mr. Cohen has rejected any settlement offers which do not provide for the removal of Reed as Executive Director of the Mid-Island Hospital.

Mr. Cohen, on the other hand, takes the position that his desire to



have Reed removed from a position of control of the hospital is based on his belief in Reed's untrustworthiness and inability to properly administer the Hospital, and a lack of motivation on his part to see that the hospital is managed in a way which will maximize profits to the Simon Cohen Real Estate and Management Company.

None of the class that were given notice appeared or gave any indication of their position on the issues raised.

In its decision directing a hearing the court noted that there is a well recognized potential for abuse and inadequate representation in derivative actions. A representative plaintiff may have a monetary conflict of interest with those he seeks to represent. A





conflict of interest may also exist where the plaintiff is motivated by personal dislike for the defendant (see Norman v. Arcs Equities Corp., 72 F.R.D. 502). In the present case, however, the proof was insufficient at this time to establish that the plaintiff's position in rejecting certain settlement offers was motivated primarily by a personal dislike for Reed, disassociated from the plaintiff's belief that the interests of the Simon Cohen Real Estate and Management Company would be better protected by the removal of Reed from a position of control, or that the plaintiff is unduly influenced by any other motive.

Accordingly, the court finds that the plaintiff is not, at the present time, disqualified from



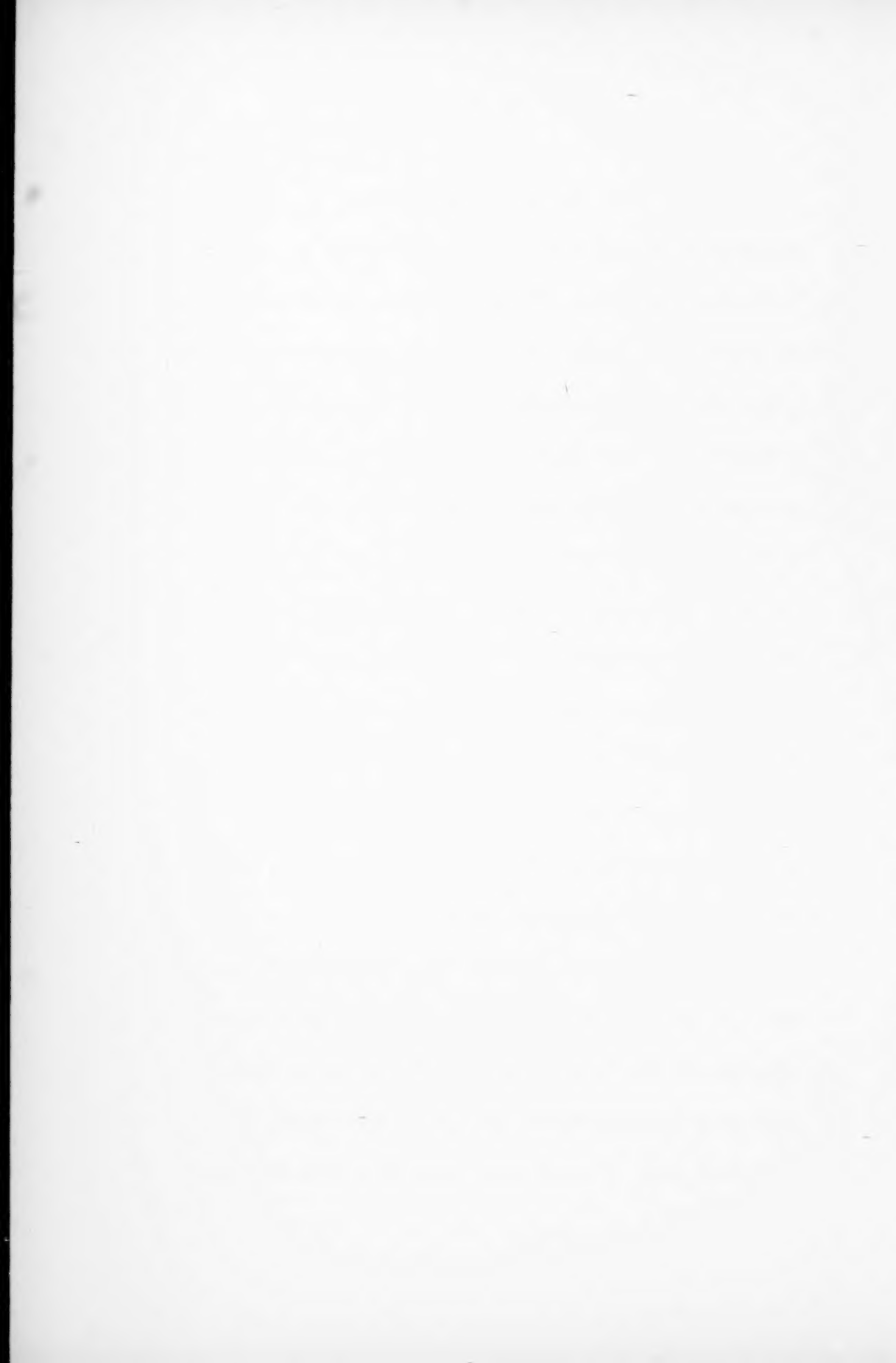
continuing as a representative plaintive in this action. The record will remain sealed as to all of the testimony heard out of the presence of the defendants and as to all items marked for identification in evidence or in evidence which were withheld from disclosure pending this decision.

The motion to substitute an attorney in place of Mr. Hochhauser is granted to the extent that the plaintiff may replace Mr. Hochhauser as attorney for the partnerships. Of course, the plaintiff has always had the right to choose an attorney to represent him on his individual cause of action (seventeenth cause of action) and the motion to substitute attorneys in that aspect of the case is granted as well.



The motion is denied to the extent that the plaintiff seeks a turnover of the files held by the attorneys. The attorneys' retaining lien depends solely on the physical possession of the property and when the property is relinquished the lien is lost. The court cannot direct the release of the files without sufficient security (*Brodsky v. Manello*, 83 AD2d 860; *Eidusen Fuel & Hdwe Co. v. Drew*, 59 AD2d 1025). If the parties can agree on the adequacy of a bond to secure the retaining liens, a turnover of all books and records will be directed.

The question of compensation not only concerns the value of services rendered to the plaintiff individually and any agreements as to compensation between the plaintiff and the attorneys,



but the amounts which may be chargeable against the partnerships for legal services, which will depend upon the recovery, if any. The determination of compensation to the attorneys will be addressed in the court's final decision which will follow the main hearing, or upon approval of any settlement agreements.

The plaintiff's motion for a stay in this court pending a decision in the federal court is denied. The decision to stay a proceeding is within the discretion of the court (CPLR 2201). This court rarely stays its own proceedings and there appears to be no reason to make an exception in this case, particularly since there is lacking a complete identity of the



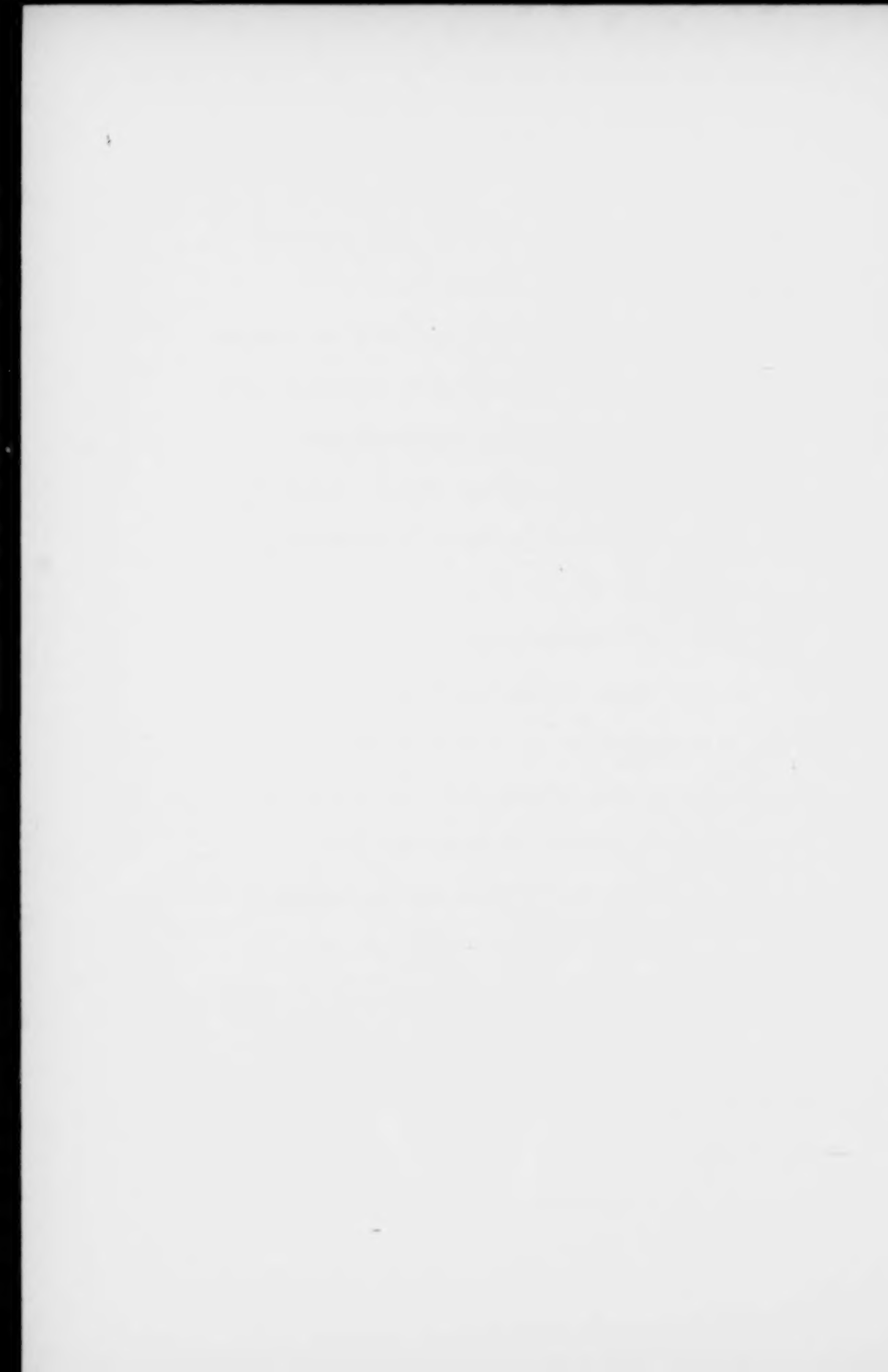


parties, causes of action and relief sought.

The cross-motion for an order providing for an injunction against any federal proceeding or proceedings pending in other courts which concern the issues raised in this proceeding is likewise denied.

Mr. Hochhauser states in his affidavit that he has not been served with a complaint in the subject federal action, nor is there any information regarding pending or prospective litigation in any other state court.

Even if the court were disposed to enjoin a proceeding in the federal court, it would not have the authority to do so. A state court has no power to enjoin a pending in personam action in a federal court (Donovan v.



City of Dallas, 377 U.S. 408), nor restrain the parties as to an action which is prospective (General Atomic Co. v. Felter, 434 U.S. 12; Jamaica Hospital v. Blum, 68 AD2d 1). Mr. Hochhauser must look to the federal court for such relief.

Following the date by which the partners were instructed to respond to the second Notice, the court will determine whether a hearing should be held as to the reasonableness of the defendants' settlement offer or whether the trial should continue. The position, if any, of those partners who have been given notice by the court of the defendants' settlement proposal may have a bearing as to whether the court will conduct a hearing on the settlement offer or proceed with the trial.



Settle order on five days'  
notice, with five additional days if  
service is made by mail.

Dated: January 18, 1983

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court

FILED  
JAN 24 1990  
F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1989

ROBERT COHEN, individually and as a Partner of  
SIMON COHEN REAL ESTATE & MANAGEMENT  
CO., SIMON COHEN REALTY CO., SIMON COHEN  
COMPANY and ALJER REALTY CO. suing on behalf of  
himself and all other partners, both general and limited,  
and in the right and on behalf of SIMON COHEN  
REAL ESTATE & MANAGEMENT CO., SIMON COHEN  
REALTY CO., SIMON COHEN COMPANY and ALJER  
REALTY CO.,

*Petitioner,*

*against*

ROBERT J. REED, SIDNEY HACKELL, BEATRICE  
POTTER and the FIRST NATIONAL CITY BANK, in-  
dividually and as Executors of the Last Will and Testa-  
ment of SIMON COHEN, deceased, WILLIAM B.F.  
WERNER, individually and doing business as MID-IS-  
LAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK,  
J.S.K. CLEANING SERVICES, INC., JUDAH FEIN-  
ERMAN, JASDANE, INC., SHELDON KATZ, VOLUME  
FEEDING, INC., DADGAB, INC., BRIMSCO, INC.,  
SIMON COHEN REAL ESTATE & MANAGEMENT  
CO., SIMON COHEN REALTY CO. and ALJER  
REALTY CO.,

*Respondents.*

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**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI  
VOLUME II OF TWO VOLUMES  
(Pages A234 to A464)**

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MICHAEL E. SCHOEMAN  
*Attorney of record for Petitioner*  
SCHOEMAN, MARSH, UPDIKE & WELT  
60 East 42nd Street  
New York, New York 10165  
(212) 661-5030

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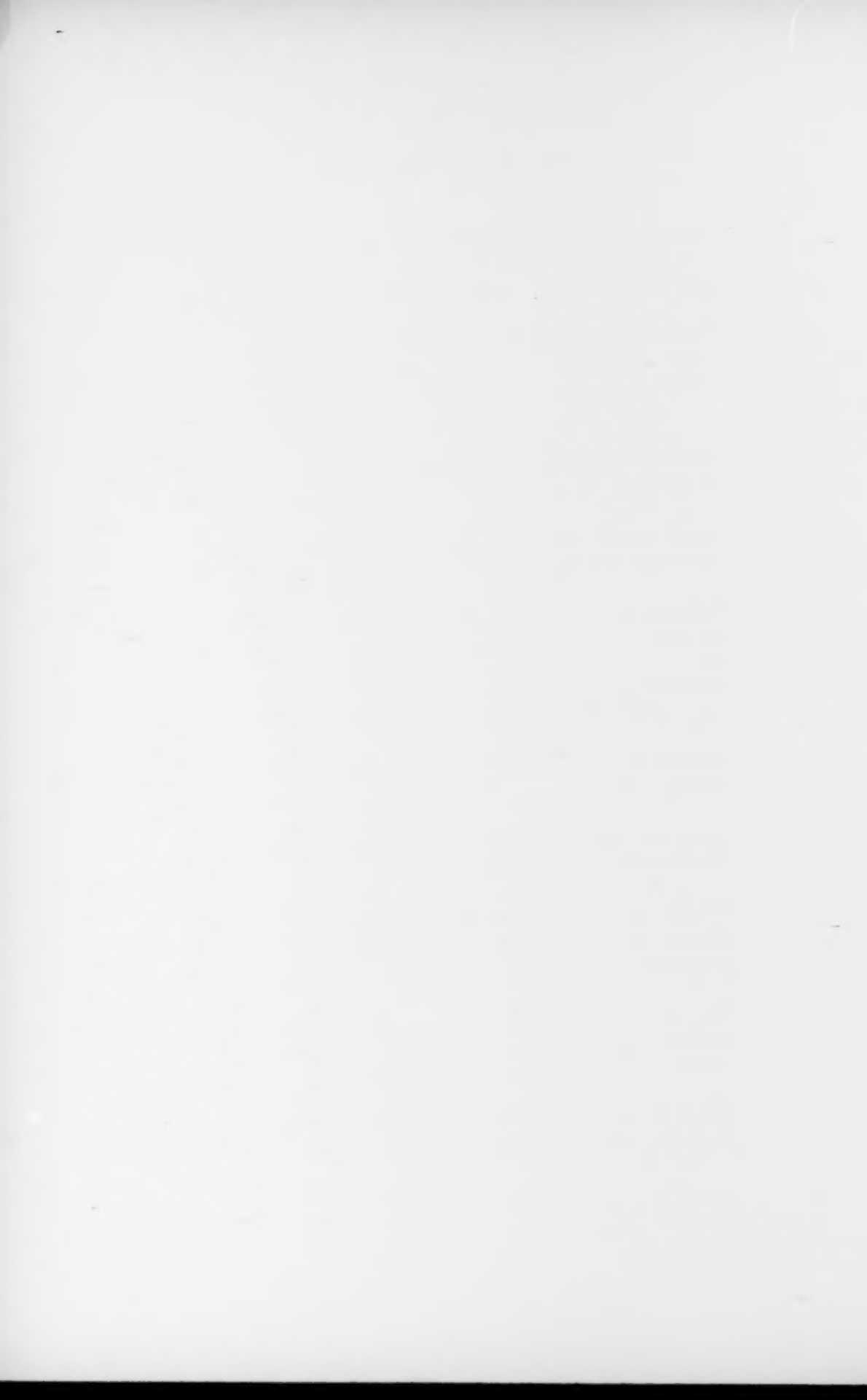
235 p





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44. Decision of the Appellate Division  
of the Supreme Court,  
Dated May 5, 1986.....A383
45. Order of the Appellate Division of  
the Supreme Court, Dated May 5,  
1986.....A394
46. Decision of the Surrogate's Court,  
Dated May 9, 1986.....A397
47. Order of the Court of Appeals,  
Dated September 16, 1986.....A401
48. Order of the Court of Appeals,  
Dated June 4, 1987.....A403





49. Order of Dismissal with Prejudice of  
the Surrogate's Court, Dated  
September 16, 1987.....A405
50. Order of the Court of Appeals,  
Dated December 17, 1987.....A408
51. Notice of Hearing of the Surrogate's  
Court, Dated April 28, 1988.....A410
52. Order of the Court of Appeals,  
Dated May 26, 1988.....A414
53. Decision of the Surrogate's Court,  
Dated August 19, 1988.....A416
54. Decision of the Surrogate's Court,  
Dated December 30, 1988.....A422
55. Notice of Hearing of the Surrogate's  
Court, Dated February 6, 1989.....A449
56. Decision of the Surrogate's Court,  
Dated April 13, 1989.....A453
57. Supplemental Decree of the  
Surrogate's Court, Entered  
May 9, 1989.....A455
58. Order of the Surrogate's Court,  
Entered May 10, 1989.....A458
59. Order of the Court of Appeals,  
Dated October 26, 1989.....A463



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION

ually and as a partner

of Simon Cohen Real :

Estate Co., etc.,

File 148704

: Dec. 11

Plaintiff,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants

:

ESTATE OF SIMON COHEN

Fix Attorneys' Fees :

Under SCPA 2110.

:

-----X

This motion to compel the court to render a decision pursuant to CPLR 2219 is denied on the grounds that the decision has been rendered.

Settle order on five days' notice, with five additional days if service is made by mail.



A235

Dated: January 24, 1983

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- :  
ually and as a partner :  
of Simon Cohen Real :  
Estate Co., etc., : File No. 148704

Plaintiff, : ORDER

- against - :  
:

ROBERT J. REED, et al., :  
Defendants. :

ESTATE OF SIMON COHEN :  
Proceedings to Fix :  
Attorneys' Fees and :  
For Advice and :  
Discretion under SCPA :  
2110 :

-----X

Plaintiff, Robert Cohen,  
having moved for an order pursuant to  
CPLR 2219, compelling Hon. C. Raymond  
Radigan to issue an order determining  
the motion of petitioner Robert Cohen to  
substitute Schoeman, Marsh, Updike &  
Welt as counsel for plaintiffs and to





direct Stephen Hochhauser, Esq. to turn over to Schoeman, Marsh, Updike & Welt all records related to this litigation, and said motion having regularly come on to be heard.

NOW, upon reading and filing the notice of motion dated December 17, 1982, the affirmation of Michael E. Schoeman dated December 17, 1982, the affirmation in opposition to motion of Stephen Hochhauser, dated December 24, 1982, and the reply affidavit of Michael E. Schoeman, sworn to December 29, 1982, and due deliberation having been had thereon,

NOW, upon motion of Schoeman, Marsh, Updike & Welt, attorneys for petitioner, it is

ORDERED, that petitioner's motion to compel the court to render a



decision be and the same is hereby  
denied on the grounds that the decision  
has already been rendered.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED February 25, 1983.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : File # 148704  
Estate and Management  
Co., : Dec. # 115

Plaintiff, :

- against - :

ROBERT J. REED, et al.,:

Defendants. :

Estate of SIMON COHEN, :  
Deceased. Proceedings  
to Fix Attorneys Fees :  
and for Advice and  
Direction Under SCPA :  
§2110.

:

-----X

The order submitted by  
Mr. Schoeman on behalf of the plaintiff  
more closely conforms to the court's  
decision dated January 18, 1983 and will  
be signed with the addition of the  
following:



"ORDERED that the motion by the plaintiff for an order directing the turn-over of books, documents, computer files, etc., related to this case and in the possession of Robert Shannon, Esq. or Stephen Hochhauser, Esq., is denied without prejudice to a renewed motion if the parties can agree on an amount to be posted as security by the plaintiff to protect the attorneys' liens."

Proceed accordingly.

Dated: March 7, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- :  
ually and as a partner :  
of Simon Cohen Real : Index No.:  
Estate Co., et al., : 148704/71

Plaintiffs, ORDER

- against -

ROBERT J. REED, et al., :  
Defendants. :

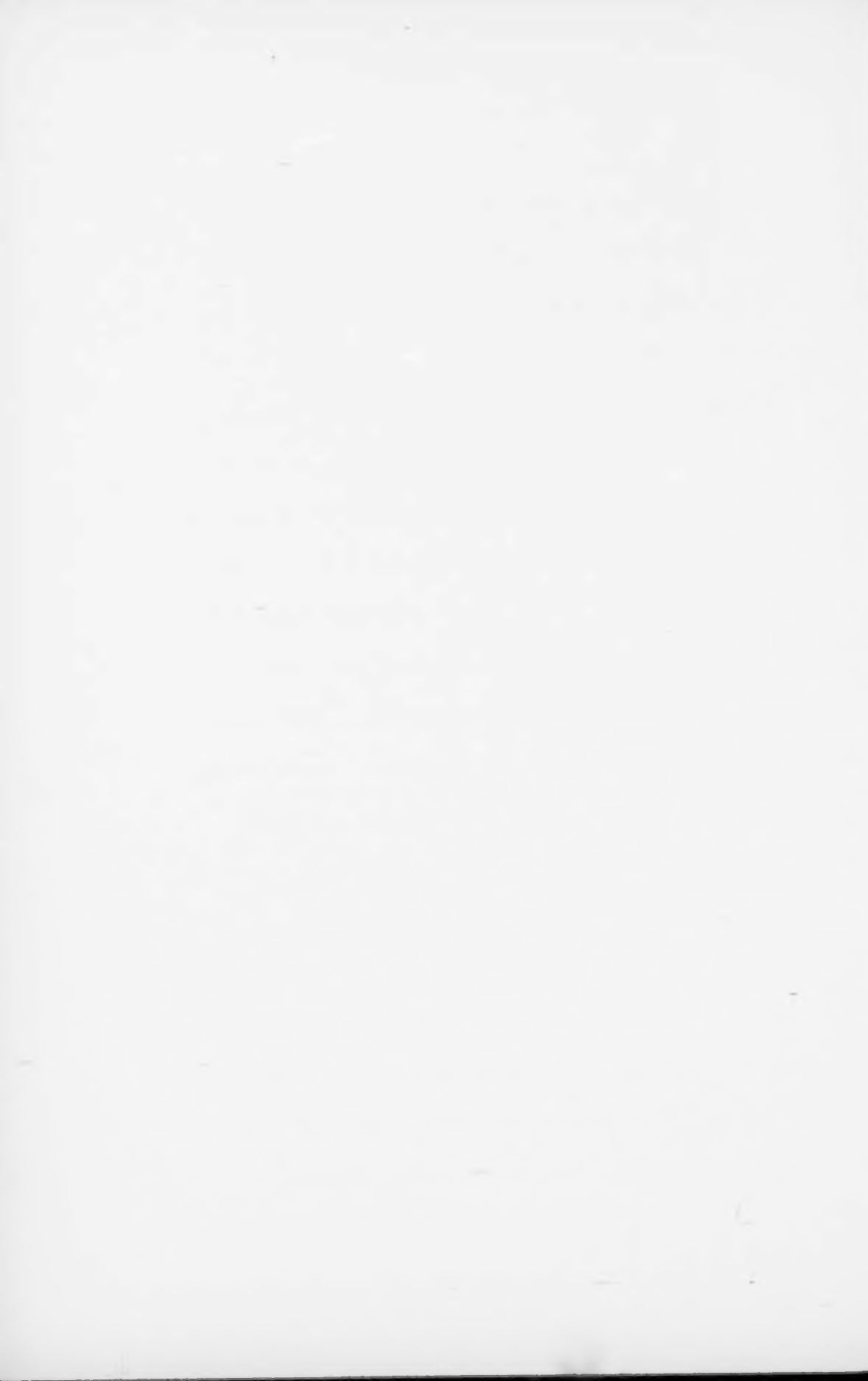
Proceedings to Fix :  
Attorneys Fees and For :  
Advice and Direction :  
under SCPA §2110 :

-----X

Plaintiff, Robert Cohen,  
having moved for an order pursuant to  
CPLR 321, directing that his attorney  
Stephen Hochhauser be relieved and that  
Schoeman, Marsh, Updike & Welt be  
substituted in his place, determining  
the fee of Stephen Hochhauser, the fee  
of a former attorney, Robert V. Shannon,



and directing both attorneys to turn over certain records and for an order directing a stay of the proceedings in this Court as to issues raised by his prior motion, pending a determination in the United States District Court in an action by the plaintiff against Stephen Hochhauser (the "federal action"), and said Stephen Hochhauser having cross-moved for advice and direction and for a stay of the federal action, and after hearing arguments of counsel, reviewing the affidavits and memoranda of law submitted by the various parties, having rendered a decision dated August 2, 1982 and having issued an order on August 17, 1982 directing the holding of a hearing on notice of all interested parties to determine whether an order should be made substituting Schoeman, Marsh,



Updike & Welt as plaintiff's attorneys, whether Robert Cohen is in a conflict of interest and, if so, what corrective steps were to be taken, and said hearing having been held on October 4, 5 and 12, 1982, and the Court having rendered a decision on January 18, 1983.

NOW, upon reading and filing the order to show cause dated March 30, 1982, the affidavit of Robert Cohen in support thereof sworn to March 26, 1982, the notice of cross-motion of Robert V. Shannon dated April 20, 1982 and the affidavit in support thereof of Robert V. Shannon sworn to April 21, 1982, the notice of cross-motion of Stephen Hochhauser dated April 21, 1982 and the affirmation in support thereof of Stephen Hochhauser dated April 21, 1982, the affidavit of Robert Corcoran, sworn



to April 26, 1982, the affirmation of Morris Rochman dated April 30, 1982, the reply affidavit of Robert Cohen sworn to May 1, 1982 in further support of his motion and in opposition to Hochhauser's cross-motion for advice and direction, the affidavit of Robert W. Corcoran sworn to May 7, 1982, the affirmation of Morris Rochman dated May 10, 1982, the notice of motion dated September 30, 1982 and the affirmation of Michael E. Schoeman in support thereof dated September 30, 1982, the cross-motion of Stephen Hochhauser dated October 6, 1982, and the affidavit in support thereof and in opposition to the motion of Stephen Hochhauser, sworn to October 6, 1982, and the answering affirmation of Michael E. Schoeman in opposition to the cross-motion for stay





of the federal action dated October 11, 1982.

NOW, upon motion of Schoeman, Marsh, Updike & Welt, attorneys for petitioner, it is

ORDERED, that petitioner's motion for substitution and ancillary relief be granted to the extent provided herein and in all other respects denied, that respondents' cross-motions thereto be denied, that petitioner's motion for a stay be denied and that respondent Hochhauser's motion for a stay be denied; and it is further

ORDERED, that Schoeman, Marsh, Updike & Welt be, and the same hereby are, substituted as attorneys of record for the plaintiffs in the place and stead of Stephen Hochhauser; and it is further



ORDERED, that the testimony and exhibits from the hearing of October 4, 5 and 12, 1982, previously ordered sealed by this Court, be and the same hereby are ordered to remain sealed and may be made available only to the Court, plaintiff and his counsel, and it is further

ORDERED, that the motion by the plaintiff for an order directing the turn-over of books, documents, computer files, etc., related to this case and in the possession of Robert Shannon, Esq. or Stephen Hochhauser, Esq., is denied without prejudice to a renewed motion if the parties can agree on an amount to be



posted as security by the plaintiff to  
protect the attorneys' liens.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED March 9, 1983.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real :  
Estate and Management  
Co., : File 148704

Plaintiff, : Dec. 256

- against - :

ROBERT J. REED, et al., :

Defendants. :

Estate of SIMON COHEN, :  
Deceased. Proceedings  
to Fix Attorneys Fees :  
and for Advice and  
Direction under SCPA :  
2110.

:  
-----X

This is an action commenced by  
the plaintiff individually and on behalf  
of certain partnerships, against his  
father's estate, the executors of the  
estate and other individuals. The  
plaintiff alleges that the defendants  
fraudulently deprived the partnerships  
of assets. The details of the numerous





causes of action have been discussed at length in previous decisions. One of these decisions was rendered following the plaintiff's motion to substitute his attorney and the attorney's cross-motion for advice and direction concerning the plaintiff's alleged inability to continue as a representative plaintiff because of an alleged conflict of interest.

The attorney, Mr. Hochhauser, had alleged that the plaintiff, Robert Cohen, had a personal animosity towards one of the defendant executors which prevented him from acting reasonably in connection with the settlement of the action and caused him to reject certain settlement proposals which were in the partnerships' best interests.

In a decision dated January 18, 1983 the court determined that at the present time there was



insufficient proof to establish that the plaintiff's rejection of certain settlement offers was motivated primarily by a personal dislike for the defendant, disassociated from his belief that the partnerships were protected by rejection of the settlement offer. It was determined in that decision that the partners should receive a new Notice, informing them of the current status of the litigation including a copy of the defendants' settlement offer (the first Notice had been forwarded, accompanied by unauthorized materials). The partners were directed in the Notice to respond in writing to the court on or before February 16, 1983. They were advised that these terms were to be considered minimal terms subject to modification by the court in order to benefit the partners.



The parties were informed in the January 18, 1983 decision that said Notice had been forwarded to the partners.

# I

Some of the partners responded in their individual capacities as partners in one or more partnerships and/or as trustees on behalf of others. A significant number of individuals indicated that they were eager to see the litigation terminated.

Some of the partners simply answered in the affirmative or the negative. Other responses were accompanied by an explanation. Some of the partners accepted the proposal with certain conditions. The following comprises an analysis of the responses. In a few cases where a trustee responded on behalf of a partner and the partner responded as well, the responses were



identical, and the partner's response alone was counted.

Simon Cohen Real Estate and Management

Twenty-nine persons responded (each person counted only once whether responding individually and/or as trustee for one or more persons).

Eighteen persons representing 17.50 units of the partnership accepted the proposal. Roslyn Rogove, whose name does not appear on the breakdown of interests as supplied to the court, accepted as well. Five persons representing 7.50 units rejected the proposal. Six persons representing 24.00 units accepted the proposal with one or more of the following conditions:

- 1) That the partners be permitted liberal inspection of the books and records of all partnerships;
- 2) That periodic accountings be furnished to the partners;
- and/or 3) That there be





disclosure of Dr. Werner's salary/distributions and access to his records. The parties have the following interests: Estate, 105.00 units; Robert Reed, 50.00 units; Elaine Wilschek, 2.00 units; Robert Cohen, 14.00 units.

Simon Cohen Realty

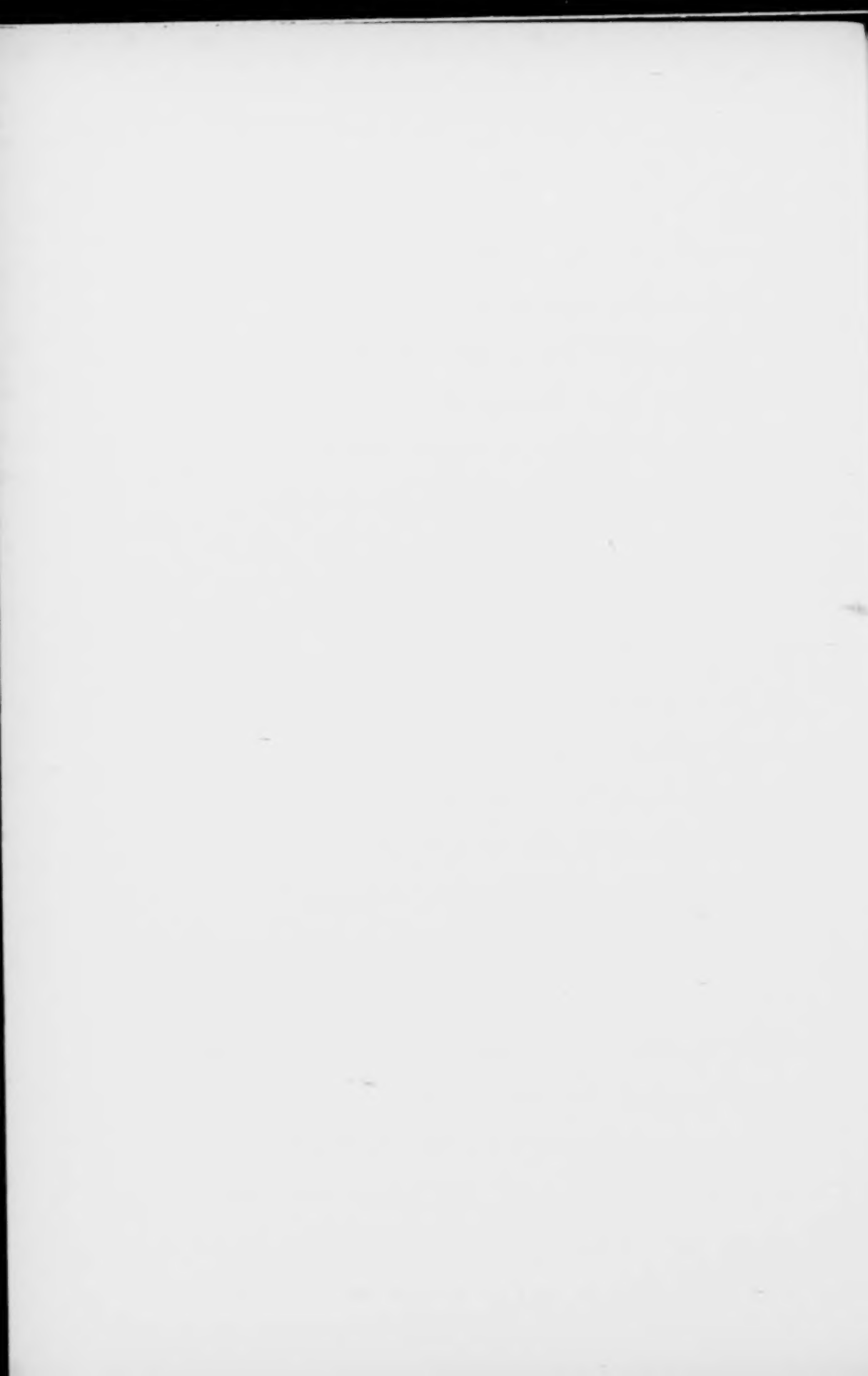
Eight persons responded. Four persons representing 20.74% of the partnership accepted the offer conditionally. Selma Gold, whose name did not appear on the breakdown of interests as supplied to the court, accepted the proposal as well. No partner rejected the offer. Four persons representing 21.76% of the partnership accepted the offer with one or more of the following conditions: 1) That the partners be permitted liberal inspection of the books and records of the partnerships; 2) That periodic accountings be furnished to the



partners; 3) That there be disclosure of Dr. Werner's salary/distributions and disclosure of his books and records; and/or 4) That the total amount of the recovery go to Simon Cohen Realty. The parties have the following interests: Estate, 40.816%; Robert Cohen, 5.442%.

Aljer

Ten persons responded. Four persons representing 22.19% of the partnership accepted the offer unconditionally. One person representing 2.00% of the partnership rejected the offer. Five persons representing 20.98% accepted the offer on one or more of the following conditions: 1) That periodic accountings be furnished to the partners; 2) That there be disclosure of Dr. Werner's salary/distributions and access to his books and records; and/or 4) One trustee for partners in Aljer requested that all



proceeds go to Simon Cohen Realty. The parties have the following interests: Robert Cohen, 19.00%; Robert Reed, 2.00%.

Simon Cohen Company

The court was not supplied with information as to the breakdown of interests in this partnership. Two persons accepted the offer unconditionally and one person accepted with three of the conditions previously mentioned.

In considering the analysis the court assumes that Robert Cohen, if polled, would have voted in the negative in each instance where he has an interest.

II

An additional condition imposed by some of the partners was that they did not wish to share the legal costs thus far incurred by Robert Cohen. However, since this is a derivative



action, to the extent that Robert Cohen represents the partnerships' interests as opposed to his individual interests, the partnerships would be responsible for attorney's fees and costs to the extent allowed by the court.

The condition imposed with respect to the allocation of any settlement proceeds to Aljer or Simon Cohen Realty alone is clearly impractical.

The limitations with respect to Dr. Werner's salary imposed by some of the partners does not specify the amount of the limitation they have in mind. However, the court will take this objection into account in passing upon the reasonableness of the defendants' offer.

Lastly, one acceptance was conditioned upon disclosure of "Schedule A" referred to in section "F" which

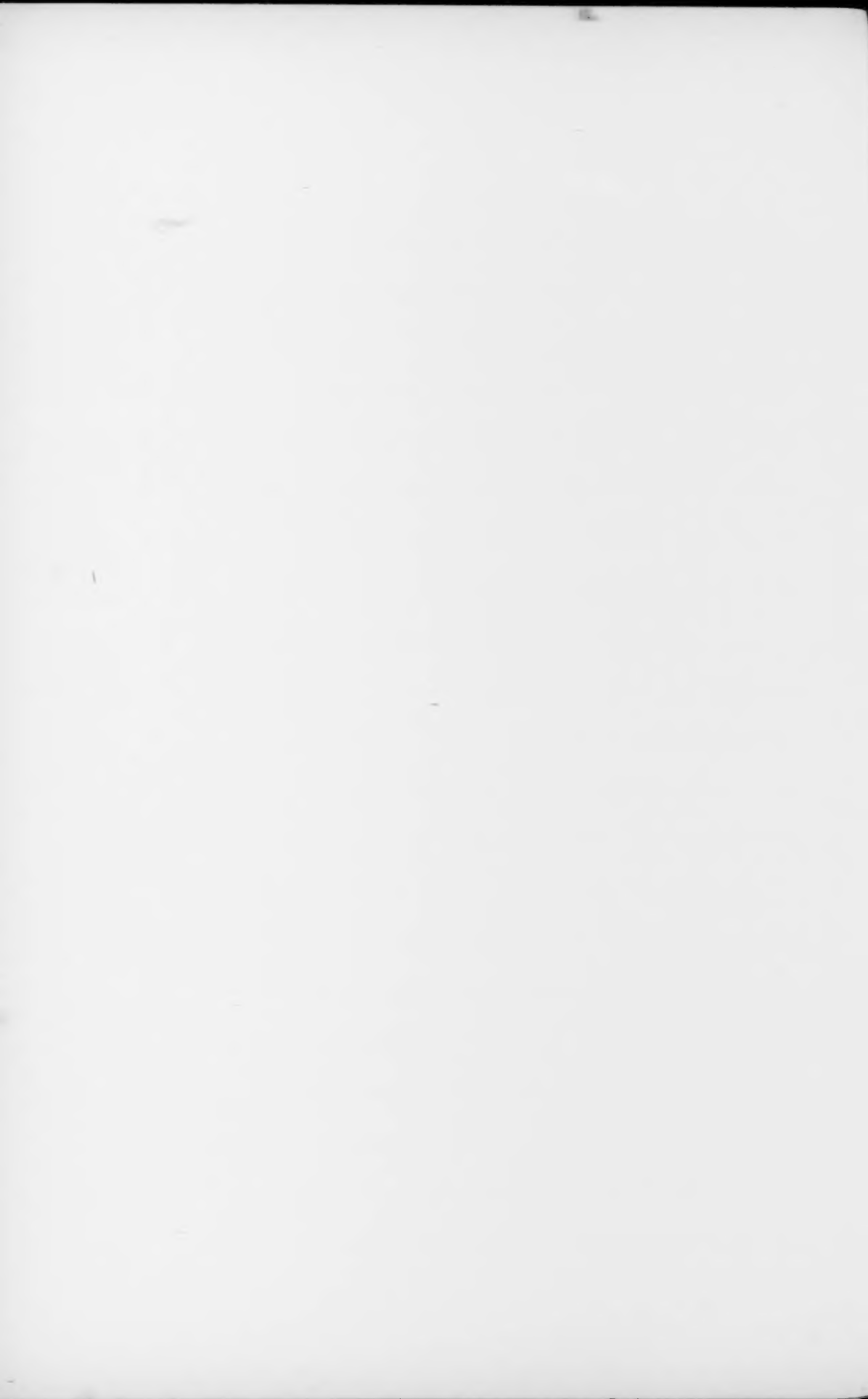




concerns attorneys' fees and accountants' fees. Apparently the schedule was not forwarded along with the proposed stipulation to the partners. However, it is again noted that any allowance for attorneys' fees from the partnerships is a matter for ultimate determination by the court.

The conditions concerning review of the books and records of the partnerships, disclosure of Dr. Werner's salary and periodic accountings will be deemed, for the next stage of the proceedings, to have been made a part of the defendants' counter-offer.

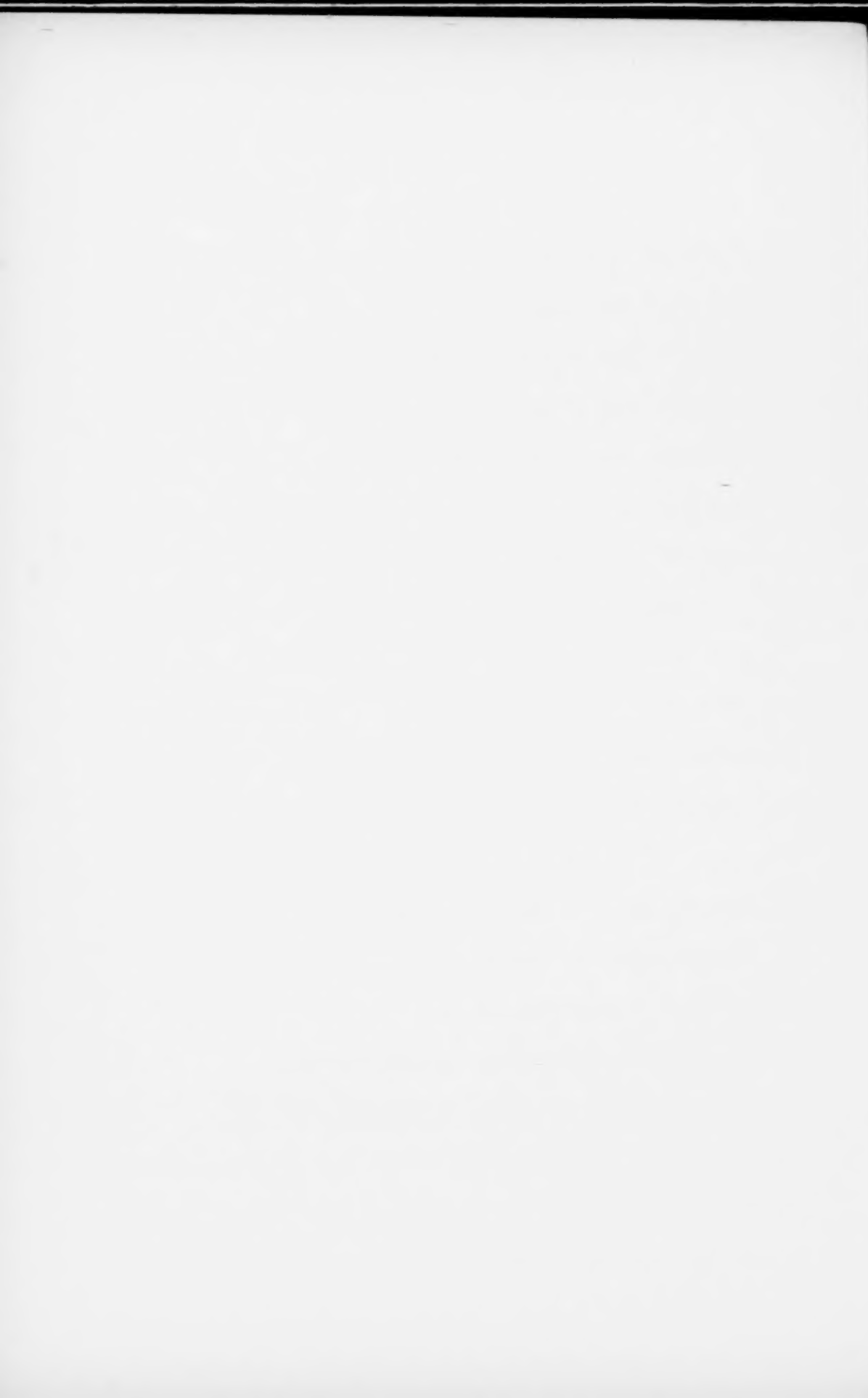
A hearing will be held on May 24, 1983 at 9:30 a.m., at which time the court will give the representative plaintiff or any partner whose objection to any part of the settlement proposal is currently on file an opportunity to



show cause why the proposed settlement should not be approved.

The court is mindful of the fact that the stewardship of a derivative suit is normally the responsibility of the representative plaintiff. Nevertheless, a settlement may be imposed over his objection (Flinn v. FMC Corp., 528 F2d 1169 cert den 424 US 967; Purcell v. Keane, 54 FRD 455) if found to be in the best interests of the partnerships.

In the present case the interests of the consenting partners in each partnership outweighs the percentage interest of the representative partner individually. The partners should be afforded an opportunity to have the court review the reasonableness of the offer at this stage in the proceedings.



If the defendants' offer, with the three conditions indicated above, is approved by the court, the defendants will be afforded an opportunity to either withdraw their offer because of nonacceptance of the three additional conditions, or reaffirm their offer with the three conditions incorporated. The same procedure applies if the court, following the hearing, makes any other modifications or additions to the stipulation for the benefit of the partners.

If the court does approve a settlement over the objection of Mr. Cohen, the court will continue the trial on his individual cause of action.

A copy of this decision will be mailed to each of the partners.

Settle order on five days' notice, with five additional days if service is made by mail.



A260

Dated: April 6, 1983

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real :  
Estate Co., et al., :  
Plaintiffs, : File 148704/71  
:  
- against - :  
:  
ROBERT J. REED, et al., :  
:  
Defendants. :  
:  
Proceedings to Fix  
Attorneys Fees and For :  
Advice and Direction  
under SCPA § 2110 :

-----X

This is a proceeding commenced  
by the plaintiff, Robert Cohen,  
individually and on behalf of certain  
partners. During the course of the  
proceedings the court determined that  
the partners should be apprised of the  
status of litigation and also of the  
offer of settlement which had been  
proposed by the defendants.  
Accordingly, the court forwarded a



notice to each of the partners, which incorporated a factual history of the case and the items indicated above and invited the partners to communicate with the court and indicate their support or rejection of the proposal.

Many of the partners responded. Some partners specifically indicated their approval, others indicated their approval with certain conditions, and a few partners rejected the defendants' offer.

In a decision dated April 16, 1983, the court reviewed the responses and scheduled a hearing for May 24, 1983, on notice to all of the partners, for the purpose of taking any testimony which would assist the court in determining whether the settlement should be approved assuming that certain conditions are accepted by the defendants. As the decision indicated,



two of the conditions proposed by some of the partners would not be part of this procedure. The first of these was that the proceeds of any recovery would go only to certain partnerships, and the second was that some partners did not wish to share the burden of attorneys' fees and expenses. The question of reimbursement of attorneys' fees and expenses for services rendered to the partnerships is one for determination by the court following a final decision in this matter, or a stipulation of settlement.

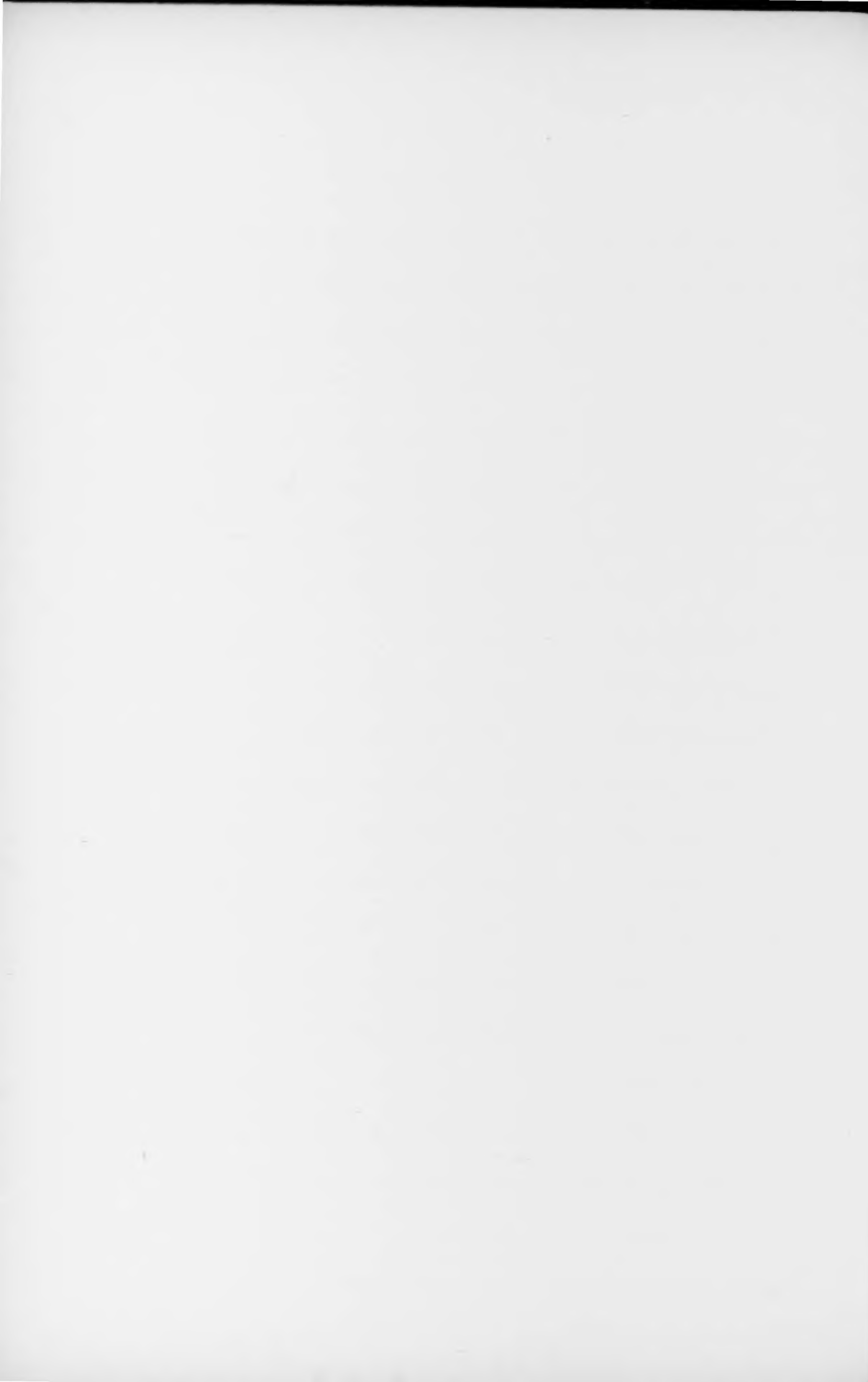
At the May 24, 1983 hearing, the plaintiff filed an affidavit indicating his objections to the procedures adopted. In particular, the plaintiff objected to the alleged "ex parte" communications with the partners. This was a reference to the responses received by the court. The responses



have always been and continue to be matters of public record. Had the plaintiff or his attorney requested to see the response following the court's receipt of them they would have been made available, as they were immediately following the hearing, on request.

An additional objection interposed by the plaintiff was that the April 16, 1983 decision contained a typographical error indicating that Mr. Reed owned 50.00 shares of Simon Cohen Real Estate and Management Company rather than .50 shares. The court notes the error, but this does not change the fact that the overwhelming majority of those responding favored acceptance of the proposal.

Mr. Cohen objects to the outlined procedure on the grounds that the settlement, if approved, would prejudice his individual rights. As the



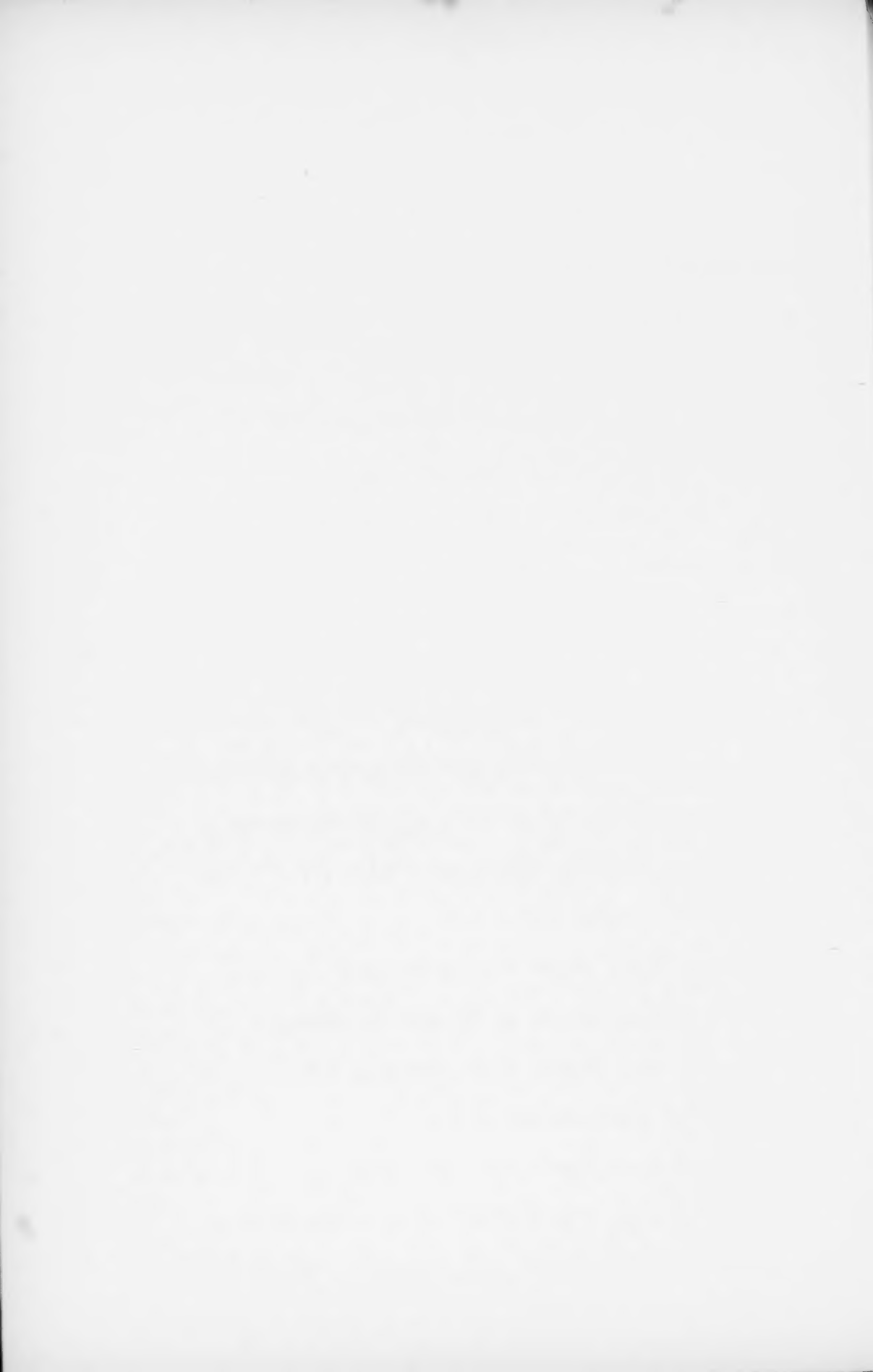


court's prior decision indicated, settlement of the derivative aspects of this suit would result in a discontinuance of the derivative causes of action only and not the plaintiff's individual cause of action (#17).

The court has determined that it would be in the best interests of all of the partners to give the defendants an opportunity to adopt the three conditions indicated above. Accordingly, the defendants will have the opportunity to accept the following conditions and incorporate them into their settlement offer:

- 1) That the partners of each of the partnerships will be afforded access to the books and records of the respective partnerships.

- 2) That semi-annual accountings be furnished to the partners of each partnership.



3) That Dr. Werner's salary and distributions be disclosed.

The defendants should indicate their acceptance or rejection of these three terms by filing responses with the court on notice to the plaintiff by July 20, 1983. If the conditions are adopted this matter will be submitted for decision. If the conditions are not adopted we will proceed with the trial of this action.

The court notes that this is not a situation where it is attempting to substitute its judgment for that of a fiduciary. (Levine v Mellin, 79 AD2d 584, mod 81 AD2d 523). In this case, the court felt that the partners, who are really the plaintiffs in this case, should be notified of the offer of settlement, and for the reasons set forth in the court's prior decisions, the court can direct a settlement when



the majority of those interested so request.

Settle order on five days's notice with five additional days when service is made by mail.

Dated: June 22, 1983.

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : File 148704  
Estate Co., et al., :  
 : Dec. 470  
Plaintiffs, :  
 :  
- against - :  
 :  
ROBERT J. REED, et al., :  
 :  
Defendants. :  
-----X

The application of the  
guardian ad litem dated June 1, 1983 in  
connection with a proposed change in the  
caption of this proceeding will be  
addressed at a future date.

No order need be submitted.

Dated: July 28, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : File 148704  
Estate Co., et al.,

: Dec. 518

Plaintiffs,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants.

-----X

In this proceeding the  
plaintiff and certain defendants have  
submitted proposed orders following the  
court's decision dated June 22, 1983.

The plaintiff's proposed order  
conforms more closely to the court's  
decision and will be signed with the  
following deletions:

(1) Beginning with the word  
"and" [page 2, line 4] and ending with  
the word "partners" [page 2, line 5];  
and



(2) The words "appropriate" [page 3, line 1] and "adequate" [page 3, line 5] are deleted and page 1, line 10 is corrected to indicate that the court rendered a decision on April 6, 1983.

Dated: August 9, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Index No.  
ually and as a partner : 148704/81  
of Simon Cohen Real :  
Estate Co., et al., :

: ORDER

Plaintiffs,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants.

-----X

This action having been commenced by the plaintiff, individually and on behalf of certain partnerships and limited partners; and the defendants herein having offered, during the course of the trial of the within action, a proposal to settle the dispute between the parties on the terms contained in a certain proposed stipulation of settlement filed by the defendants with the Court; and the Court having notified the partners on whose behalf this action was instituted of the terms of the



proposed settlement, and having invited them to communicate with the Court their support or rejection of the proposal; and the Court, in a decision, dated April 16, 1983, having reviewed all of the responses from the partners, and having directed that a hearing be held on May 24, 1983, at which the plaintiff or any partner whose objection to any part of the settlement proposal was on April 16, 1983 on file was directed to show cause why the proposed settlement should not be approved and copies of said decision having been mailed to all parties and the said partners; and a hearing having been held on May 24, 1983; and after having heard counsel for defendants in support of the proposal of settlement upon the terms specified in the aforesaid stipulation, and counsel for the plaintiff in opposition thereto; and the Court wishing to determine





whether the defendants accept certain conditions and incorporate the same into their settlement offer;

NOW, upon the decisions of this Court, dated June 22, 1982, and August 9, 1983, and upon all of the pleadings and proceedings heretofore had herein; it is,

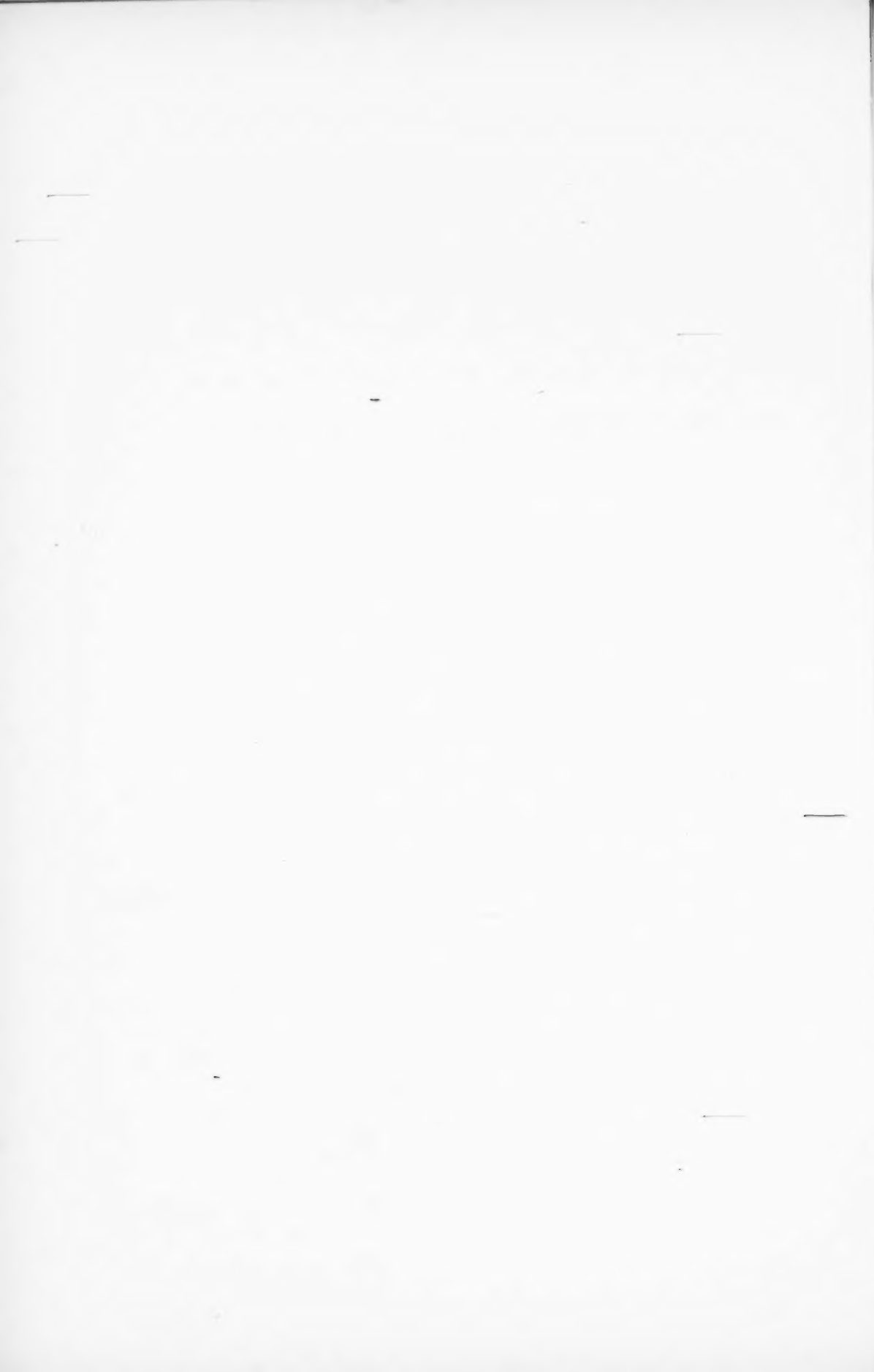
ORDERED, that the defendants, by filing appropriate responses with the Court on notice to the plaintiff, on or before July 20, 1983 indicate their acceptance or rejection of the following three (3) conditions: (1) that the partners of each partnership will be afforded access to the books and records of the respective partnerships including in the case of SCREAM, the books and records of Mid Island Hospital, subject to guidelines to be set by the Court; (2) that semi-annual accountings be furnished to the partners of each



partnership including in the case of SCREAM an accounting of the financial affairs of Mid Island Hospital; and (3) that the defendant, Dr. WERNER's salary and distributions be disclosed; and, it is,

ORDERED, that if the defendants, on or before July 20, 1983, indicate their acceptance of the aforesaid conditions by filing responses, on notice to plaintiff, this matter will be submitted for decision; and, it is further,

ORDERED, that if the defendants indicate their rejection of the aforesaid three (3) conditions, or if they fail to file accepting responses

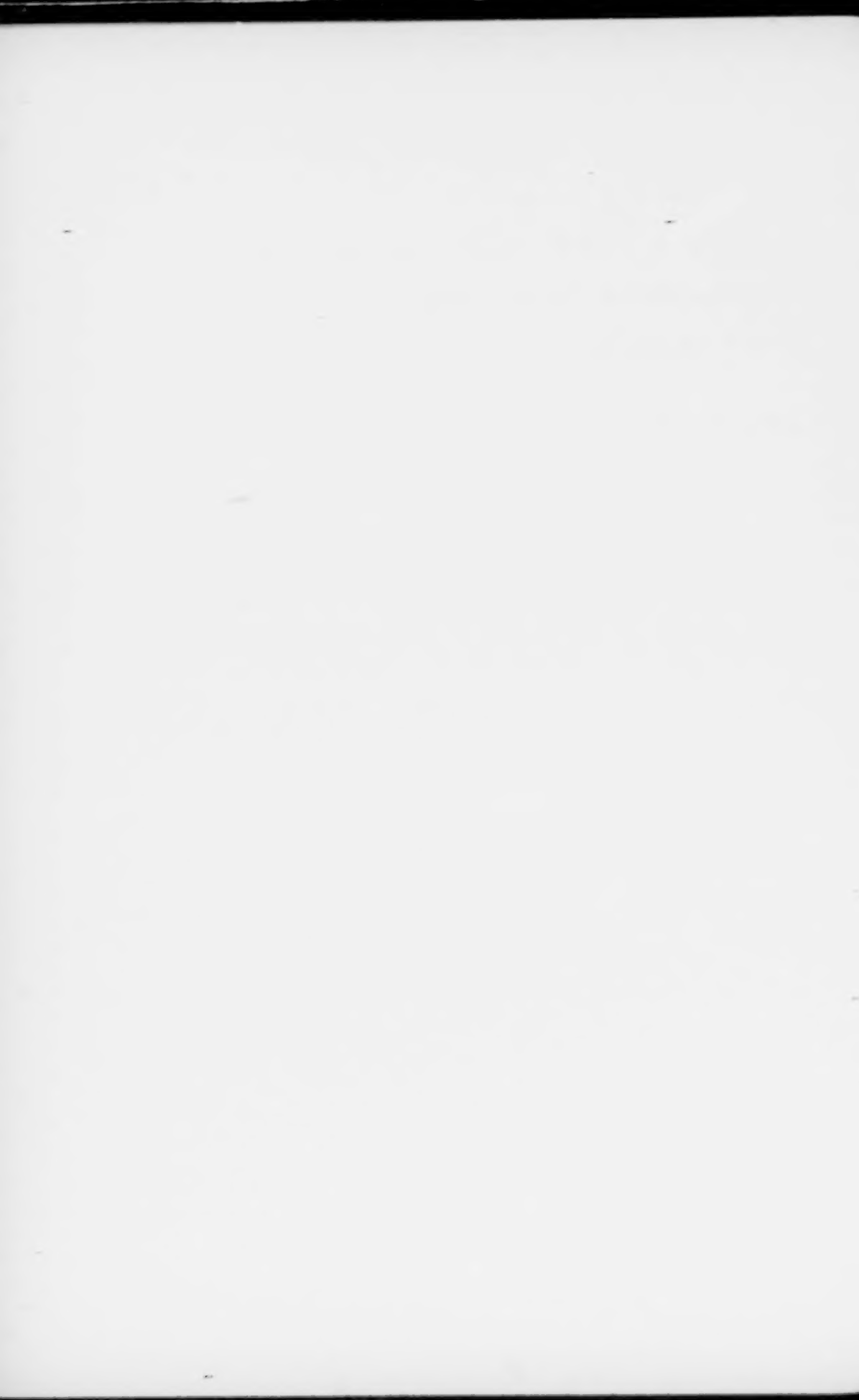


A275

on notice to the plaintiff, on or before  
September 14, 1983, trial of this action  
will be resumed.

Dated: August 9, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	File No.
ually and as partner	:	148704
of Simon Cohen Real	:	
Estate Co., et al.,	:	Dec. No. 676

Plaintiffs,

- against -

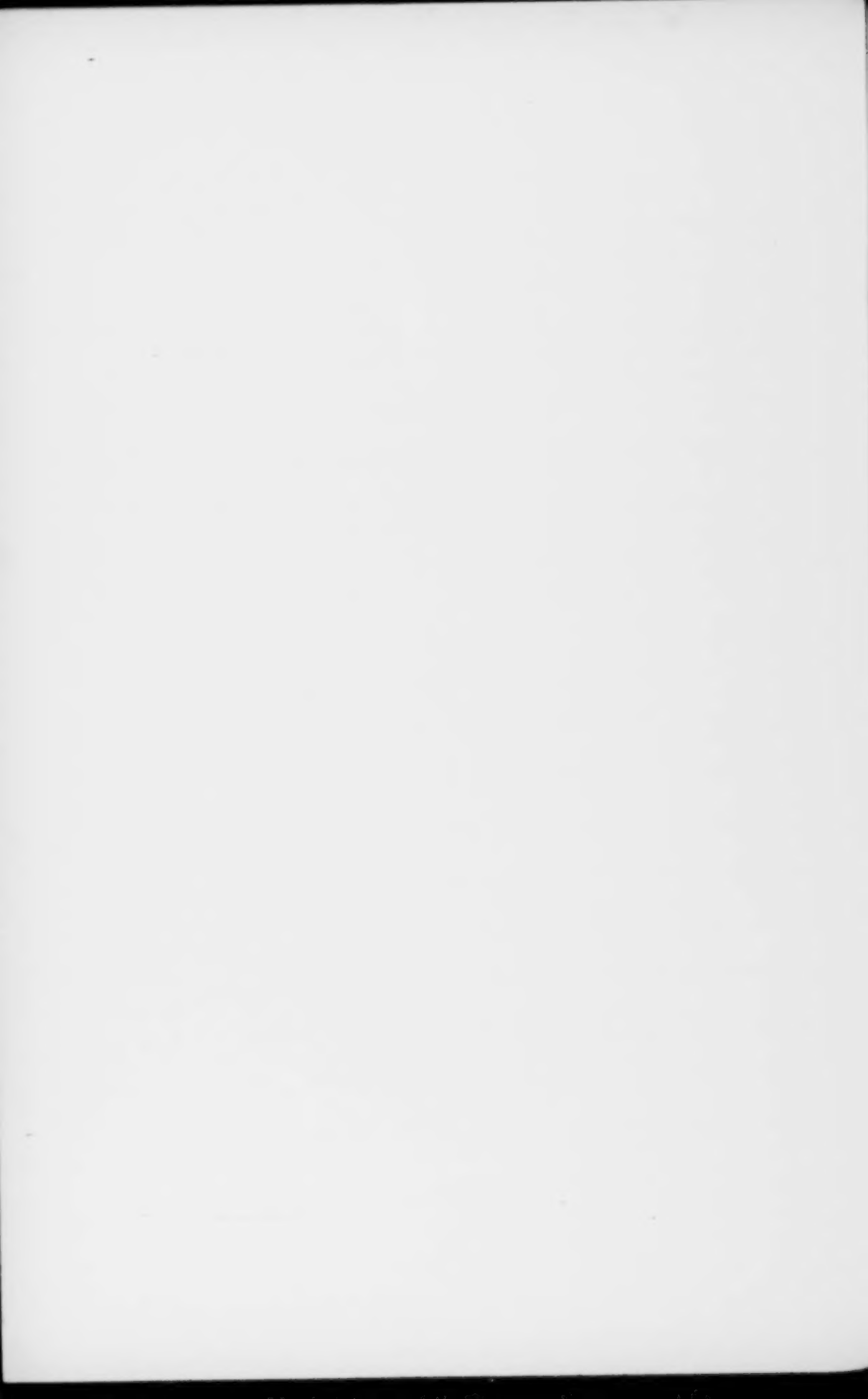
ROBERT J. REED, et al.,

Defendants.

-----X

This is a motion by the plaintiff, Robert Cohen, for an order directing the Clerk of the Court to photocopy "pleadings, answers, motions and responses to motions."

The plaintiff's attorney has already been informed that if he will select which papers he wishes to have photocopied, the court will supervise the reproduction. The files in question

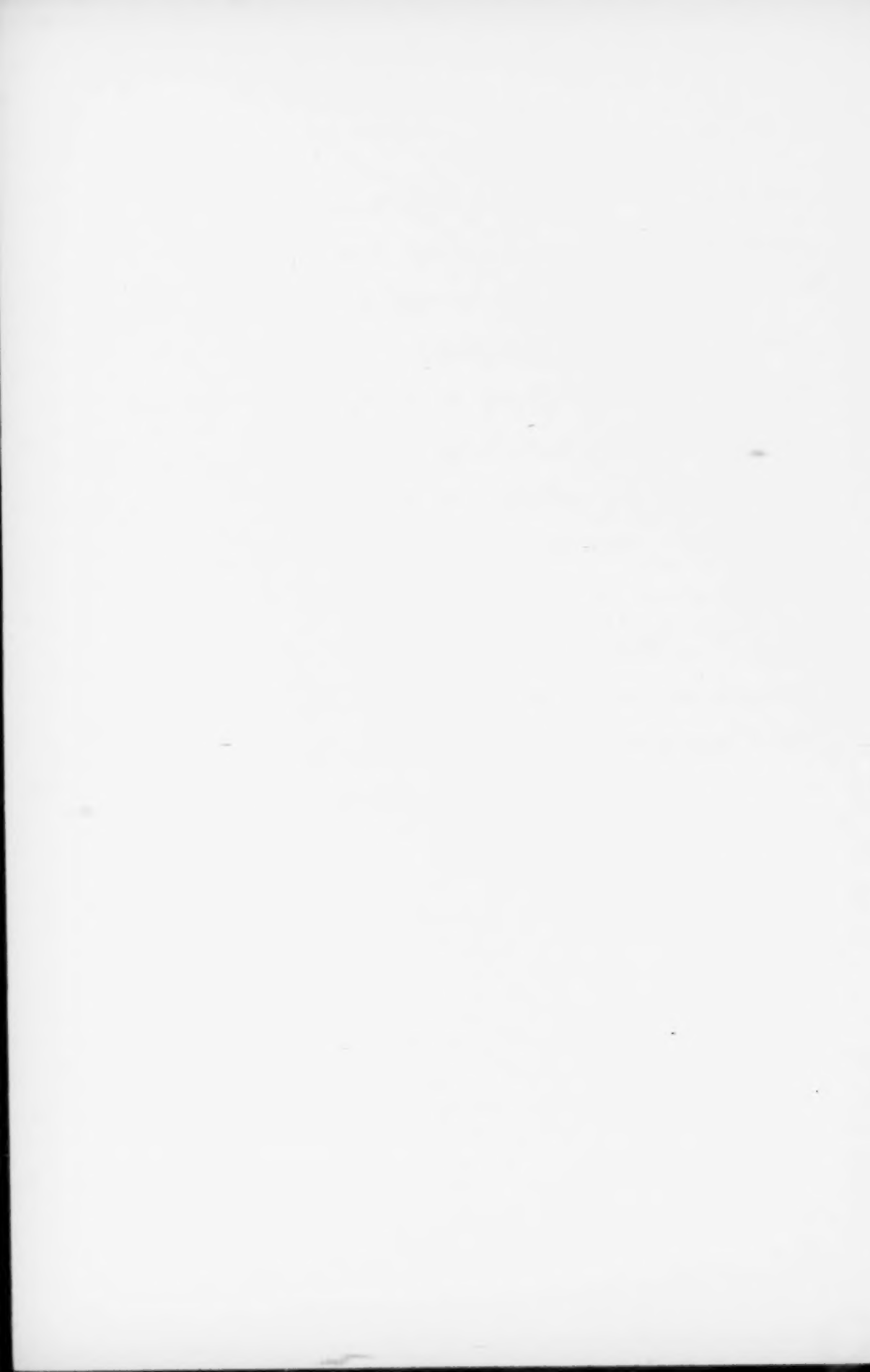




are a matter of public record and are available for review at any time.

However, it is not the responsibility of the court, nor is there sufficient staff to fulfill a request to have the files searched for all pleadings, motion papers and decisions. The court does not offer this service to any litigants.

This particular litigation spans a period of more than ten years. There are presently over twelve large files in the matter containing thousands of papers.



Accordingly, the motion is denied, without prejudice to following the procedure outlined above.

Dated: December 2, 1983

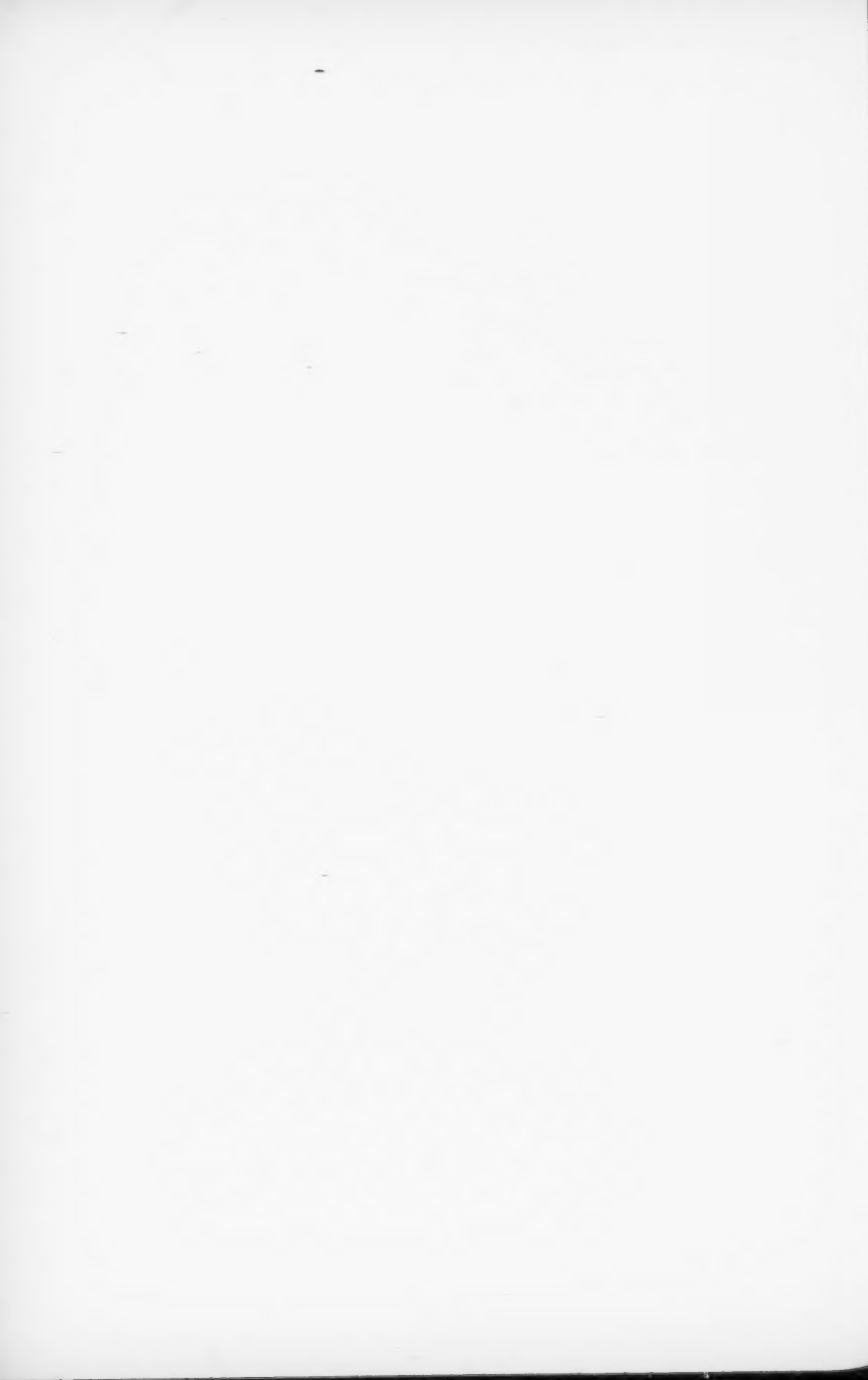
/s/

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



A277b

[Intentionally Left Blank]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a partner :  
of Simon Cohen Real : DECISION  
Estate Co., Inc., :  
: File No. 148704  
Plaintiffs, :  
: Dec. No. 944  
- against - :  
: ROBERT J. REED, et al, :  
: Defendants. :  
: Estate of SIMON COHEN :  
-----X

This is a motion by the  
plaintiff for an order compelling the  
court to render a decision on the  
plaintiff's motion to re-settle an order  
dated August 9, 1983.

As the decision has been  
rendered, the question is moot. It is  
however noted that the original motion  
and cross-motion of the defendants was





removed from the list of those matters submitted for decision because of a discrepancy described in a decision released concurrently herewith. The matter was resubmitted and determined in that decision.

Dated: January 6, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

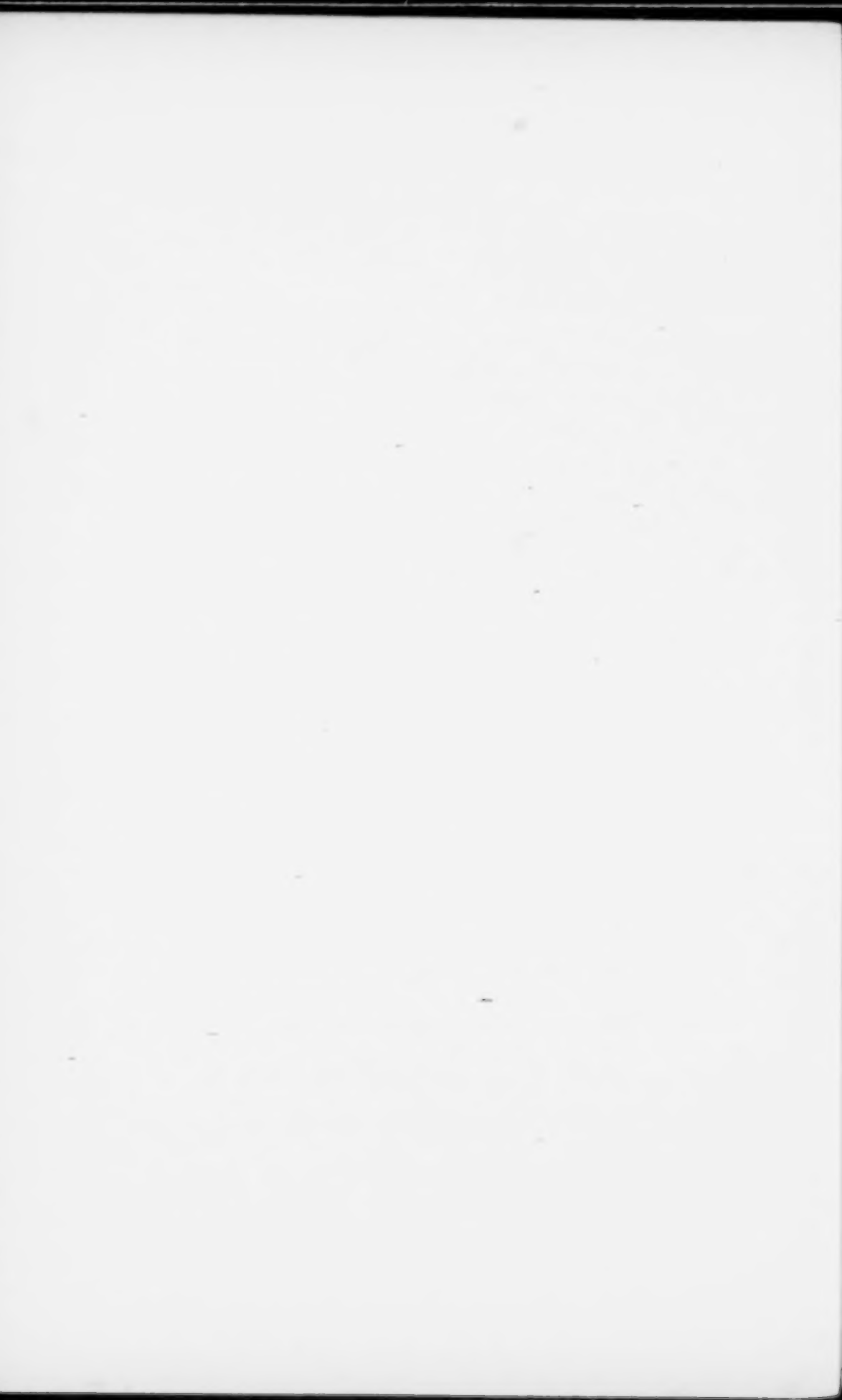
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ROBERT COHEN, Individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704
	:	
Plaintiff,	:	Dec. No. 919
	:	
- against -	:	
	:	
ROBERT J. REED, et al,	:	
	:	
Defendants	:	
	:	
Estate of SIMON COHEN	:	

-----X

Before the court is a motion by the plaintiff and a cross-motion by certain defendants to re-settle an order dated August 9, 1983.

The order dated August 9, 1983 followed the court's decision dated June 22, 1983, which determined that it would be in the best interests of the partners to give the defendants an



opportunity to accept certain added conditions to the stipulation proposed by some of the partners. The decision set forth the three conditions and directed the defendants to indicate their acceptance or rejection of these conditions.

The plaintiff's attorney moved for an order modifying the August 9, 1983 order so as to include a fourth condition imposing a limitation on Dr. Werner's salary.

The defendants cross-moved for an order modifying the August 9, 1983 order on the ground that it did not conform to the June 22, 1983 decision. In the supporting papers, the defendants made reference to language purportedly contained in the defendant's offer of settlement, which was distributed to the



partners. This language differed from the language actually contained in the proposed stipulation which was distributed. The court sought clarification from the defendants of the discrepancy.

Thereafter, the attorney for the defendants filed an affidavit indicating that they would adopt the terms of the stipulation which was distributed by the court. They contend, nevertheless, that the language of the August 9, 1983 order does not conform to the decision dated June 22, 1983.

The decision directed the defendants to indicate their acceptance or rejection of the following conditions:

1. That the partners of each of the partnerships will be afforded





access to the books and records of the respective partnerships.

2. That semi-annual accountings be furnished to the parties of each partnership.

3. That Dr. Werner's salary and distribution be disclosed.

Although there are provisions in the stipulation for the inspection of the Hospital's records, they are not part of the conditions imposed by the partners. Provisions E(c), (iv) (1), (2), (3), (4) and (5) of the proposed stipulation set forth the procedures for production and audit of the records of the Mid-Island Hospital.

Accordingly, the defendants' cross-motion is granted and the following clause stricken from page 2 of the order: "including in the case of



SCREAM, the books and records of Mid Island Hospital subject to guidelines to be set by the court".

The plaintiff's motion is denied. The suggestion that Dr. Werner's salary be limited in some way was a suggestion made by one of the partners and concurred in by three other partners. However, the language of the partner's letter indicated that it was of lesser importance than the other conditions. In addition, the court does not believe that it is a reasonable condition. Accordingly plaintiff's motion is denied.

The defendants are to indicate their acceptance or rejection of the three conditions set forth in the order of August 9, 1983, as amended herein, on or before February 15, 1984. In



addition, the defendants (other than those represented by Speno Goldberg Moore Margules & Corcoran, P.C.) are to indicate their acceptance of the proposed settlement as distributed to the parties by the court (January 13, 1983) as part of the "Notice of Settlement Offer".

Proceed accordingly.

Dated: January 6, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704

Plaintiff,	:	Dec. 38
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- against -

ROBERT J. REED, et al.,	:
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Defendants.	:
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Estate of SIMON COHEN	:
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-----X

This action which was transferred from the Supreme Court, Nassau County, was commenced by the decedent's son Robert Cohen individually and as a general and limited partner of various partnerships. The defendants are the executors of Simon Cohen's estate, individually and in their fiduciary capacities. Essentially it is the contention of Robert Cohen that his father conspired with other individuals





to divert assets from the partnerships and that the decedent and others were responsible for perpetrating a fraud on the partners and for waste and mismanagement of partnership assets. There are seventeen causes of action, sixteen of which are brought by the plaintiff individually and on behalf of the partnerships. One cause of action is brought by the plaintiff solely on his own behalf. A prior motion for summary judgment resulted in dismissal of the first and third causes of action.

The partnerships on whose behalf this proceeding was commenced are the Simon Cohen Real Estate and Management Company (SCREAM) Simon Cohen Company (SCC) Alger Realty Company (ALGER) and Simon Cohen Realty (SCR).

The primary focus of this proceeding has been on the alleged breach of fiduciary duty on the part of



the decedent and others with respect to the profits of SCREAM. The plaintiff contends that the profits of the Mid-Island Hospital (M-I-H) which were to be paid to SCREAM pursuant to an agreement were instead diverted from SCREAM through "satellite" businesses and individuals by the decedent's design, in cooperation with others.

During the course of the trial, Robert Cohen, the representative plaintiff, moved for an order directing the substitution of Stephen Hochhauser, Esq. as plaintiff's counsel. Mr. Hochhauser cross-moved for advice and direction from the court based on which he contended was a conflict of interest on the part of the representative plaintiff. Mr. Hochhauser contended that Mr. Cohen was not capable of making reasonable judgments concerning the advisability of accepting certain



settlement proposals because of his alleged personal animosity towards one of the defendants, Robert Reed. Mr.

- Hochhauser contended that these personal feelings resulted in the rejection of settlement offers which were in the best interests of the partners.

In a decision dated August 2, 1982, the court determined that it was proper to address the issues raised by Mr. Hochhauser, as attorney for partners who had not actively participated in a derivative action (*Pettway v. American Cast Iron Pipe Co.*, 576 F 2d 1167 cert den 439 US 1115) and to apprise the partners of the issues. The plaintiff was directed to mail a copy of the August 2, 1982 decision and a Notice of Hearing to all partners apprising them of (1) the status of settlement negotiations, (2) the allegations of conflict of interest, (3) the motion for



an order substituting counsel, and (4) the date of the hearing of items (2) and (3). A hearing was subsequently held and the motion for an order substituting counsel was granted. In a decision dated January 18, 1983, the court determined that the facts did not justify a disqualification of the representative plaintiff on the basis of a conflict of interest (NYLJ 1/26/83 p 15 col 1).

In the interim settlement negotiations continued. The plaintiff made a settlement offer and the defendants made a counter-offer which the plaintiff did not accept. The court determined that the partners should be notified of the defendants' proposal. Accordingly, a "Notice of Settlement Offer", "Description of Litigation" and a copy of the proposal were forwarded to each of the partners (decision dated





January 13, 1983) who were invited to communicate their acceptance or rejection of the offer on or before February 16, 1983.

In a decision dated April 6, 1983, the court reviewed the responses and certain demands imposed by some of the partners as a condition to their acceptance of the proposal (described below). It was then determined that for the next stage of the proceedings three conditions would be deemed part of the defendants' settlement proposal and at a later date the defendants would be afforded an opportunity to accept or reject the conditions. It was further directed that a hearing be held on May 24, 1983 to permit the representative plaintiff or any other partner whose response was on file to show cause why the settlement offer should not be approved. The only



partner who appeared on the date of the hearing was Robert Cohen. The Court then determined that the number of positive responses to the proposal justified submitting the proposal for court approval. The defendants accepted the three conditions and this proceeding has reached the stage where the court must determine whether the settlement proposal should be approved (Partnership Law 115-a subd [4]).

The most important factor to be considered in the settlement of a derivative action is the strength of the plaintiff's case balanced against the sum offered in settlement (City of Detroit v. Grinnell Corp., 495 F 2d 448, Marcus v. Putnam, 60 FRD 441). Other factors to be considered are (1) whether the parties negotiated at arm's length, (2) oppositions to the settlement, (3) expense of trial, and (4) whether



discovery has been completed so that the parties can assess the strengths and weaknesses of their positions (Rodgers v. Sound of Music Co., 74 Misc 2d 699).

With respect to the objections to the settlement, a prior decision of the court (NYLJ 4/19/83 p 14 col 6) reviewed the responses of the partners in detail. The overwhelming majority of the partners who responded favored the settlement and they represented a substantial percentage of the respective partnership interests, far outweighing the interests of the objectors, including the individual interest of the representative plaintiff.

Some of the partners who hold substantial interests in the various partnerships conditioned their approval on the following: (1) that the partners be permitted liberal inspection of the books and records of the partnerships,



(2) that periodic accountings be furnished to the partners, and (3) that there be disclosure of the salary and distributions to Dr. Werner (owner and operator of M-I-H) and his records. The defendants were asked whether they wished to accept these conditions and the following provisions were accepted by the defendants (1) that the partners be permitted to inspect the books and records of those partnerships in which they have an interest, (2) that semi-annual accountings of the partnerships will be furnished, and (3) that Dr. Werner's salary and distributions be disclosed.

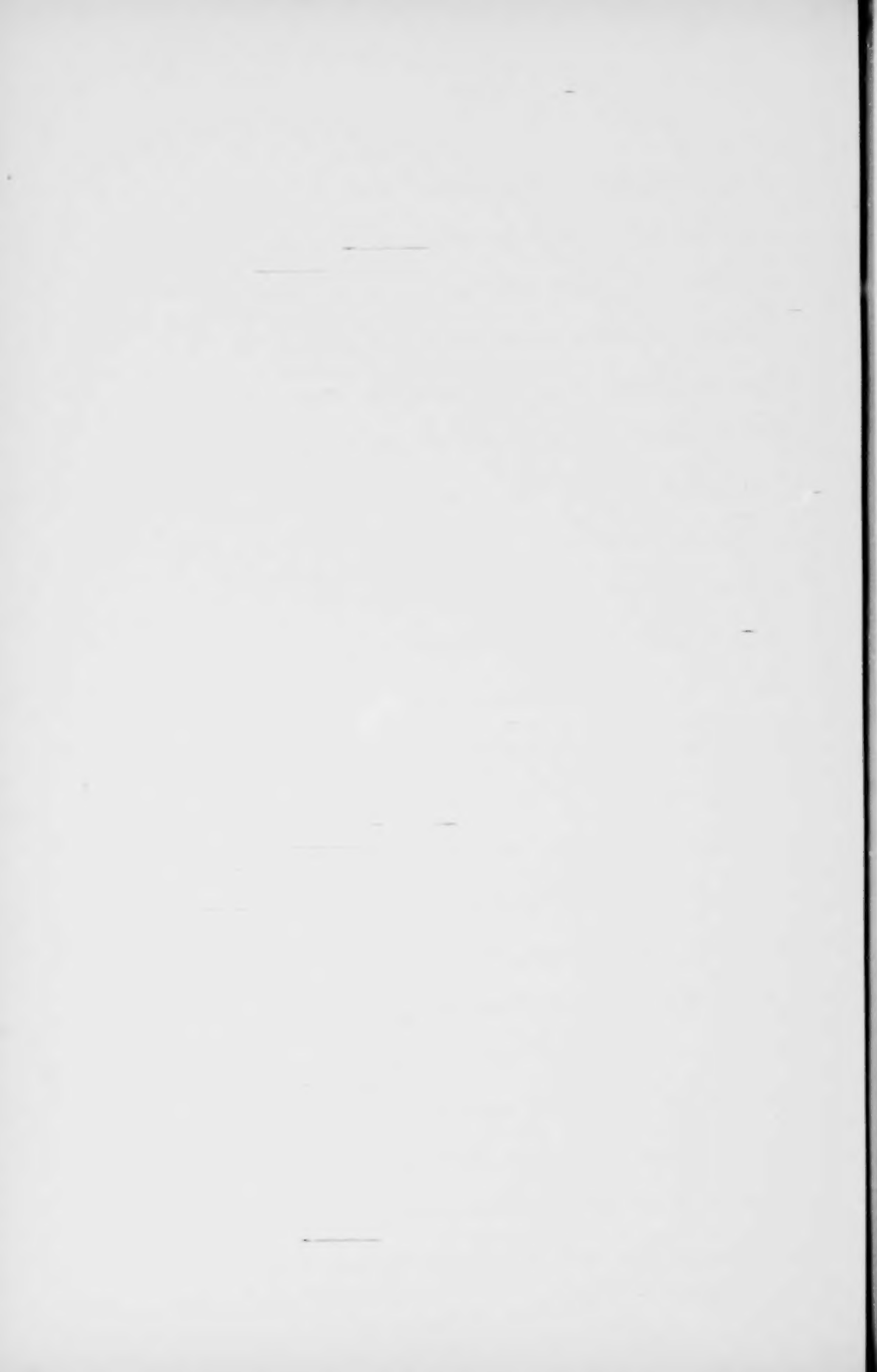
An additional condition imposed by some of the partners was that they be relieved of the responsibility for attorneys' fees and expenses. Since this is a derivative action, to the extent that Robert Cohen represents the





partnerships' interests, the partnerships may be responsible for attorneys' fees and expenses. Other partners requested that the proceeds of the settlement be allocated only to those partnerships in which they have an interest. This is clearly an unreasonable condition. The request for a limitation on Dr. Werner's salary is a condition which the court said it would consider in determining the reasonableness of the settlement. The settlement does in fact provide for a limitation on Dr. Werner's compensation.

The remaining few objectors offered no factual support or cohesive arguments against the settlement. Robert Cohen's primary objection to the settlement appears to be that it does not provide for the removal of Mr. Reed from a position of control in M-I-H. In its previous decision the court found



that theis was not sufficient reason to disqualify the representative plaintiff. However, since this is not an issue which is incorporated in the complaint, the desire of the representative plaintiff to remove Mr. Reed from a position of control of M-I-H should not stand in the way of a settlement against the wishes of the other partners, if the settlement proposal is reasonable.

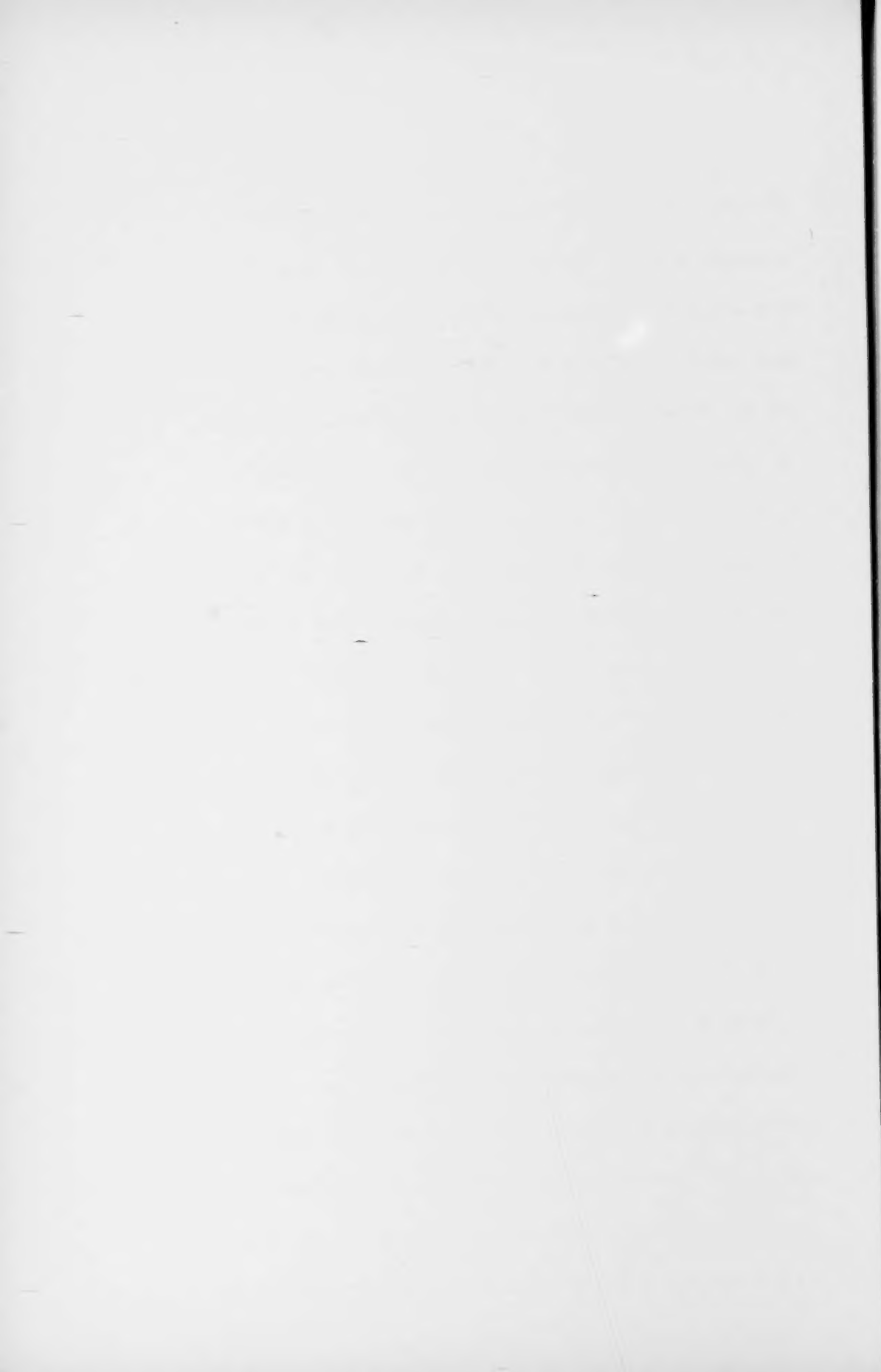
#### The Issues

In determining whether a settlement is reasonable the court has no authority to reach ultimate conclusions on issues of fact or law but should make some assessment of the probabilities of success (*Stull v. Baker*, 410 F Sup 1326). In this case the complaint alleges that the decedent in cooperation with other defendants withdrew monies from the partnerships and concealed withdrawals. It is



further alleged that the defendants conspired to defraud SCREAM of its profits by excessive payments for goods and services to M-I-H. Additionally, it is alleged that there was mismanagement of partnership assets. Not only must the plaintiff prove the facts alleged, he must prove damages as well. With respect to SCREAM, the plaintiff must not only show that the decedent hired friends and associates to provide services which could have been done "in-house" but that he incurred unreasonable expenses to the detriment of SCREAM.

The defendants vigorously contest the allegations. They have also raised the defense of the statute of limitations which may in fact be applicable to some of the causes of action. On a prior motion for summary judgment the court determined that the statute of limitations was a ground for



dismissing two causes of action but that as to some of the remaining causes of action, issues of fact as to when the actions complained of occurred made it impossible to compute the time period involved and to determine whether the statute of limitations barred the actions. The court notes an error in that decision which would not, however, have changed the result. In the decision the court determined that the statute of limitations was the later of six years from the date on which the acts occurred or two years from the date the representative plaintiff knew or could with reasonable diligence have discovered the alleged wrongdoing (CPLR §213 subd [8], §203 subd [f]). However, in a derivative action, knowledge on the part of the representative plaintiff would not defeat the cause of action belonging to





the partnership (Armstrong v. McAlpin, 699 F 2d 79, Mencher v. Richards, 256 AD 280). Knowledge or imputed knowledge on the part of the partnership rather than the plaintiff, individually, would be controlling. Employing this standard, the statute of limitations may still be a bar to some of the causes of action.

Additionally, the defendants raise the defense of laches which may be applicable to the equitable causes of action for an accounting, breach of trust and reformation of the contract between M-I-H and SCREAM.

#### The Settlement

In sum it cannot be said with any certainty that the partnerships will be successful on any or all of the causes of action. There are obvious questions of law and difficulties of proof which support approval of this



compromise (Zerkle v. Cleveland-Cliffs Iron Company, 52 FRD 151).

Moreover, the compromise has the added advantage of settling some conflicts which could not be resolved by a trial (Levin v. Mississippi River Corp. 59 FRD 353, affd 486 F 2d 1398). The proposal provides for periodic accountings for all the partnerships, and for inspection of the records of M-I-H by SCREAM, which hopefully will prevent future disputes. This is an added factor favoring approval (see Purcell v. Keane, 54 FRD 455).

The court, having presided over this trial which has produced to date, a record in excess of 5,500 pages, is of the opinion that this settlement is in the best interests of the partners. The court is aware that settlement offers in class and derivative actions are rarely approved



in the absence of the consent of the representative plaintiff or plaintiffs.

The position of the representative plaintiff is, however, similar to that of a guardian ad litem (*Denicke v. Anglo California National Bank*, 141 F 2d 285 cert den 323 US 739) in that he represents the interests of those who have not appeared or cannot appear.

Accordingly, in cases where the court determines that the settlement proposal is in the best interests of those on whose behalf the action is brought, the settlement may be approved without the consent of the plaintiff (*Flinn v. FMC Corp.*, 528 F 2d 1169 cert den 424 US 967, *Purcell v. Keane*, 54 FRD 455). A representative plaintiff has a duty not only to vigorously prosecute an action but to use wisdom and judgment in negotiating a reasonable settlement



(Norman v. Arcs Equities Corp., 72 FRD 502).

Accordingly, the proposed settlement is approved except for imposing condition 1E on the plaintiff. If the plaintiff and defendants can agree as to the plaintiff's status as a partner in SCREAM, they may enter into a stipulation of settlement concerning same. If they cannot, but the defendants otherwise agree to the proposed settlement, then the court will continue to take evidence on that issue as well as the matter set forth under Article Seventeenth of the plaintiff's complaint which was brought by the plaintiff individually.

The court will conduct a conference to establish a schedule for the submission of papers and a hearing on the question of attorneys' fees for services rendered to Mr. Cohen,





individually and those fees and expenses which may be chargeable to the partnerships.

A copy of this decision will be mailed to each of the partners. The defendants are directed to deposit with the Chief Clerk of the Surrogate's Court the sum of \$300.00 to cover the cost of copying and mailing a copy of this decision to each of the partners.

Settle order on five days' notice with five additional days if service is made by mail.

Dated: April 27, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

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ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., et al.,	:	148704
	:	
Plaintiffs,	:	Dec. No. 125
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

The motion for a new trial is rendered moot by the court's decision dated April 27, 1984 which approved the settlement of this action. Accordingly, the motion is denied. As to the remaining issues to be tried, the court will give directions concerning same at a later date.

Accordingly, the motion is denied. This decision constitutes an



order of the court.

Dated: May 10, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



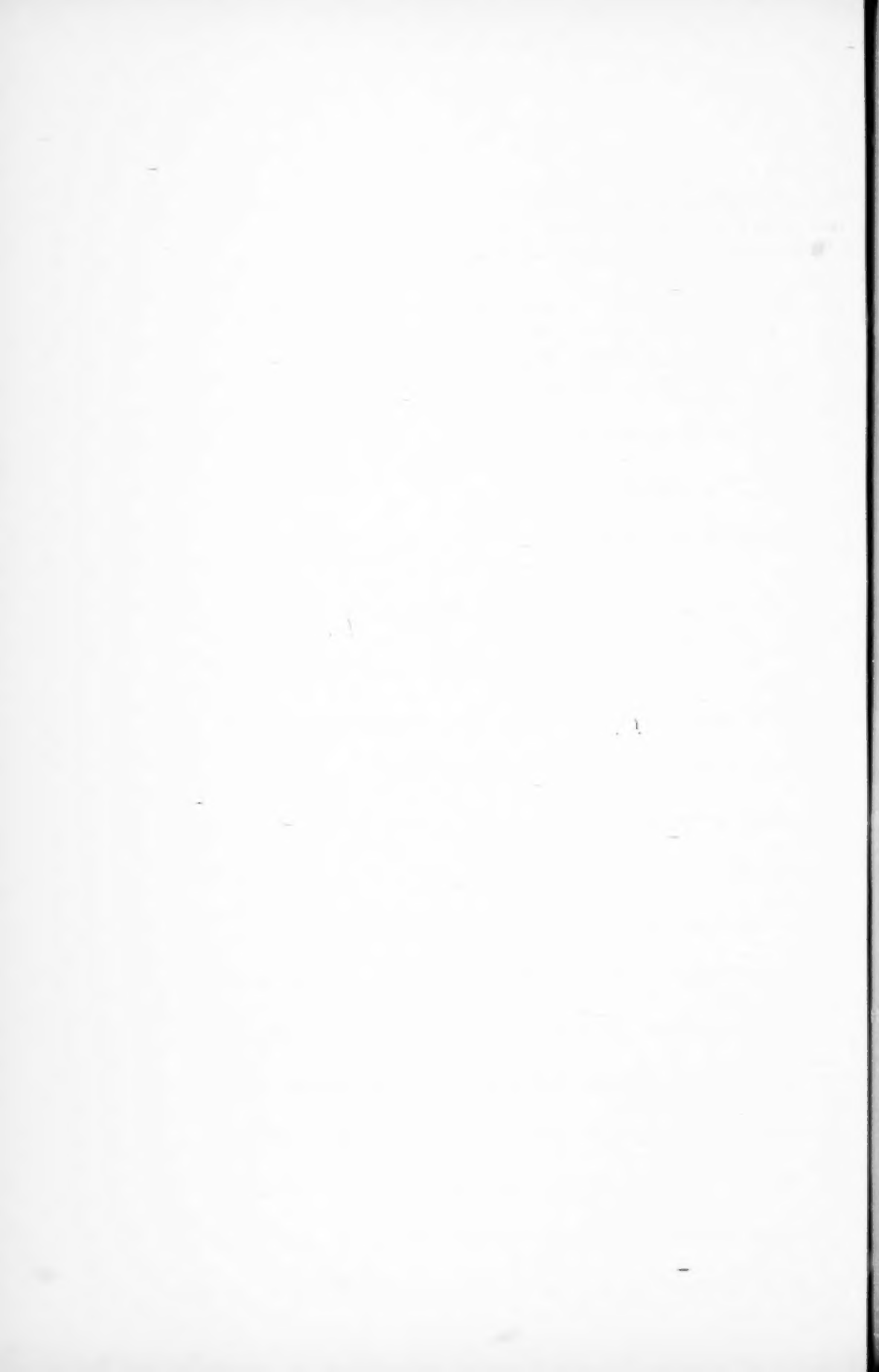
SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	File No.
of Simon Cohen Real	:	148704
Estate Co., et al.,	:	
	:	Dec. No. 344
Plaintiffs,	:	
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

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In this miscellaneous proceeding an order and counter-order have been submitted, neither of which accurately reflects the court's decision of April 27, 1984, and the terms of the stipulation of settlement which was approved. The order should contain a recitation of the prior proceedings in this court and should incorporate the stipulation of settlement itself rather than a re-wording of the stipulation. Additionally, the order should reflect the court's decision with respect to the





17th cause of action as well as the question of the plaintiff's status as a partner in the Simon Cohen Real Estate and Management Company.

Resettle order on five days' notice with five additional days if service is made by mail.

Dated: July 3, 1984

/s/\_\_\_\_\_

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	Index No.
ually and as a partner	:	148704/71
of Simon Cohen Real	:	
Estate Co., Inc., et	:	
al.,	:	<u>ORDER</u>

Plaintiffs, :

- against - :

ROBERT J. REED, et al.,:

Defendants. :

-----X

Plaintiff Robert Cohen having moved this Court for an order pursuant to CPLR 4402 granting to plaintiff a new trial on the grounds that the inordinate delay in the resumption of the pending trial had prejudiced his right to a fair trial and that such delay had violated plaintiff's right to a speedy and unprejudiced disposition of the matters at issue, and said motion having regularly come on to be heard,



NOW, upon reading and filing of the notice of motion dated January 31, 1984, the affidavit of Robert Cohen, sworn to January 30, 1984 in support thereof, the affirmation of Steven Louros, dated February 9, 1984 in opposition to said motion, the affirmation in opposition of Albert J. Fiorella, dated February 14, 1984, the affidavit of Robert J. Reed, sworn to February 10, 1984, in opposition to plaintiff's motion for a new trial, and said motion having been submitted and having been decided by the Court in an order dated May 10, 1984,

NOW, upon motion of Schoeman, Marsh, Updike & Welt, attorneys for plaintiff Robert Cohen, it is

ORDERED, that plaintiff's motion for a new trial be, and the same hereby is, denied; and it is further



ORDERED, that as to the  
remaining issues to be tried in this  
matter, further direction will be given  
to the parties at a later date.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED July 23, 1984.]





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	DECISION
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704
	:	
Plaintiff,	:	Dec. No. 929
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

In this miscellaneous proceeding a decree and counter decree have been submitted. The decree submitted by the defendants will be signed with the following changes:

(1) On page 34, the last paragraph after the phrase "shall be allotted to the payment of attorney's fees for services rendered to", the following is inserted: "the partnerships and what if any reimbursement should be made to the representative plaintiff for attorneys'



fees and expenses paid on behalf of the partnerships."

(2) On page 39, the second to last paragraph is stricken and the last paragraph on page 39 which continues on page 40 is likewise stricken. The court reserves decision as to Karide Realty. A provision for Karide was not a part of the stipulation which was forwarded to the partners.

(3) On page 41, the words "this order" are stricken. The court's decision provided for the deposit of \$300 to cover the cost of forwarding a copy of the decision to the partners.

A copy of the decree will be forwarded to each of the partners. The defendants are directed to deposit with the court on or before December 12, 1984, the sum of \$200 to cover the cost of forwarding copies of the forty-one page decree.



This constitutes an order of  
the court.

Dated: November 21, 1984.

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court

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12  
13

SURROGATE'S COURT:  
COUNTY OF NASSAU

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ROBERT COHEN, individ-	:	
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704/71
	:	
Plaintiff,	:	DECREE
	:	
-against-	:	
	:	
ROBERT J. REED,	:	
et. al.,	:	
	:	
Defendants.	:	

-----X

Upon reading and filing:

1. the summons and  
complaint, dated August 13, 1971;
2. the notice of motion of  
the defendants seeking transfer of  
action from the Supreme Court, Nassau  
County to the Surrogate's Court, Nassau  
County, dated October 19, 1971, together  
with the supporting papers attached  
thereto;
3. the affidavit of  
plaintiff, sworn to November 1, 1971,





submitted in opposition to the motion to transfer the case to the Surrogate's Court;

4. the affidavit of Robert J. Reed, sworn to November 2, 1971, together with the papers attached thereto, submitted in reply to the plaintiff's affidavit in opposition to the transfer of the matter to the Surrogate's Court;

5. the supplemental reply affidavit of Robert J. Reed, sworn to November 9, 1971, submitted in support of the defendants' application to transfer the matter to the Surrogate's Court;

6. the consent of the Surrogate's Court, dated November 24, 1971, to the transfer of the action from the Supreme Court to the Surrogate's Court;



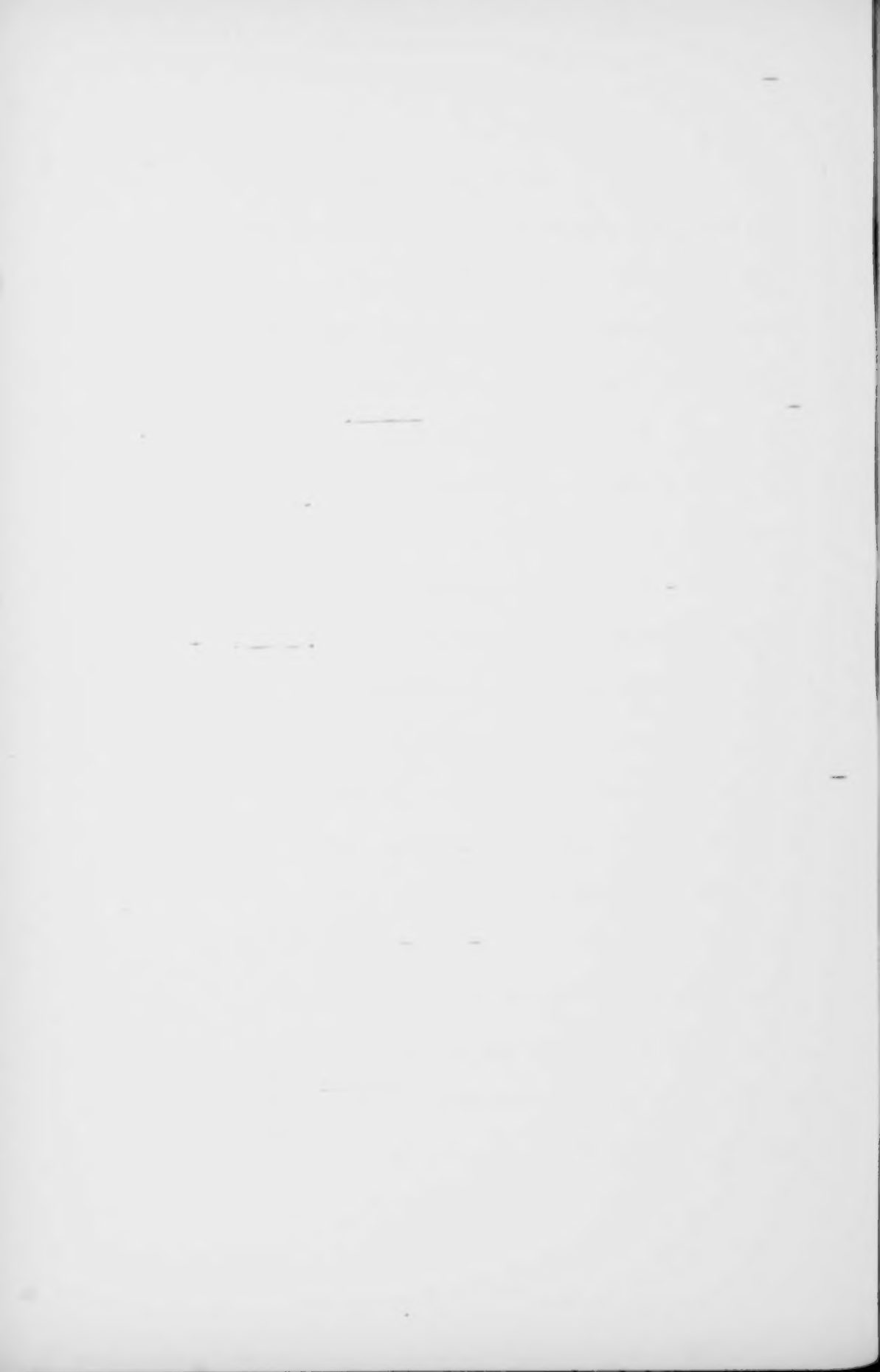
7. the short form Order of the Supreme Court of the State of New York, County of Nassau (Albert, J.), dated December 1, 1971, transferring the matter to the Surrogate's Court;

8. the defendant's demand for a bill of particulars, dated December 14, 1971;

9. the answer and counterclaims of defendants, Reed, Hackell, Potter, First National City Bank, Werner, Simon Cohen Real Estate and Management Co., Simon Cohen Realty Co. and Simon Cohen Company, verified December 22, 1971;

10. the defendants' notice of deposition, dated December 22, 1971;

11. the plaintiff's notice of deposition of defendants, Reed and Werner, dated March 9, 1972;



12. the plaintiff's reply, dated May 25, 1972, to the defendants' counterclaims;

13. the plaintiff's motion, dated May 25, 1972, to strike the defendants' counterclaims numbered second and third;

14. the decision of this Court, dated July 11, 1972, dismissing the defendants' counterclaims numbered second and third;

15. the plaintiff's notice of motion and affidavit of Stephen Hochhauser for Protective Order, dated October 19, 1972;

16. the affidavit of Robert W. Corcoran in opposition to plaintiff's motion to terminate examination before trial, dated October 25, 1972;

17. the decision of Surrogate Bennett denying without prejudice



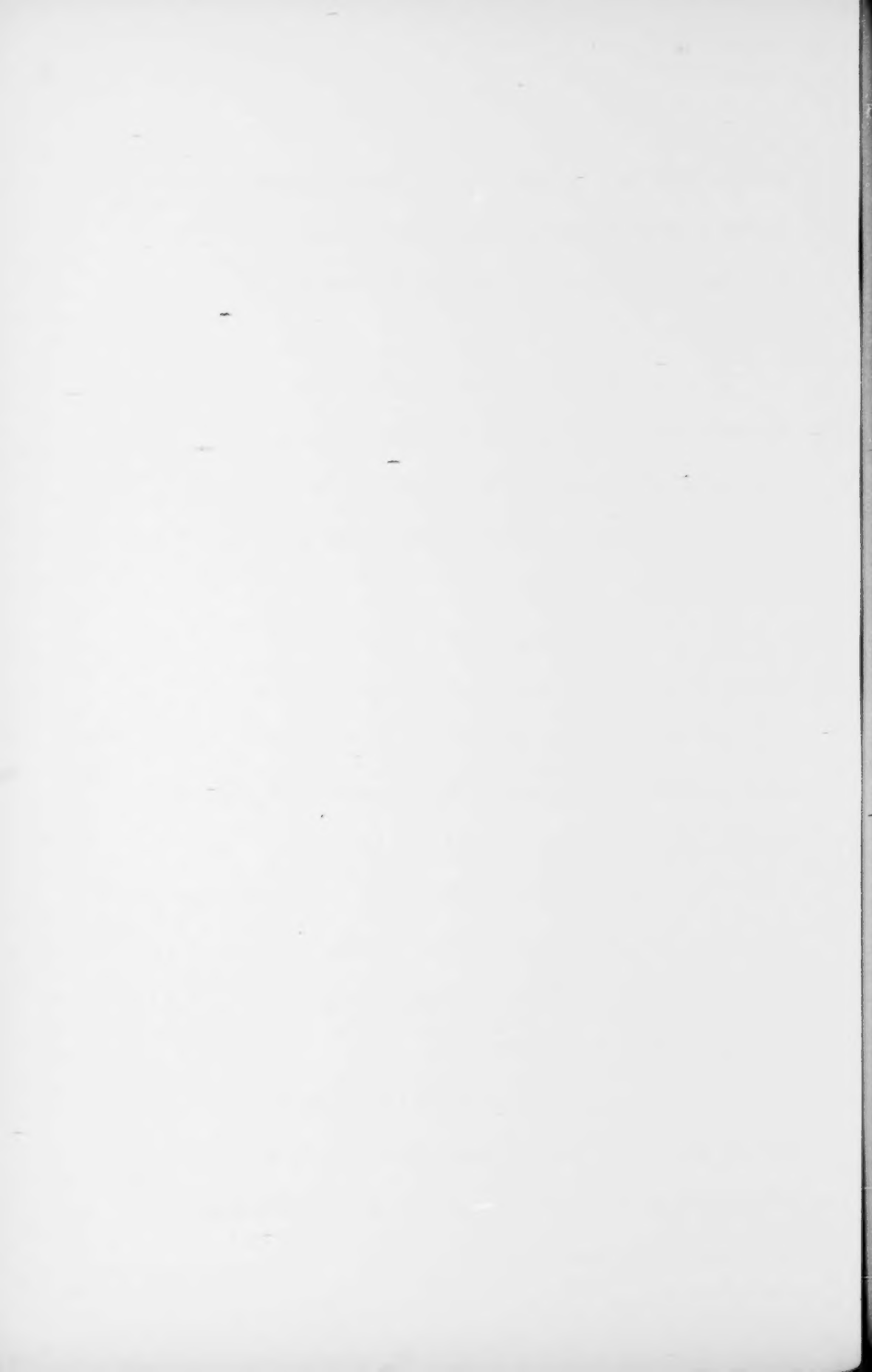
plaintiff's motion for a Protective Order; and scheduling deposition for November 30, 1972, dated November 17, 1972;

18. the affidavit and notice of motion of Stephen Hochhauser in support of plaintiff's motion to impose the sanctions of CPLR 3126, dated February 27, 1974;

19. the affidavit in opposition by Robert J. Reed to the relief sought by the plaintiff as specified in the notice of motion, dated March 13, 1974;

20. the affidavit in reply by Stephen Hochhauser in response to the answering affidavit of Robert J. Reed, dated March 19, 1974;

21. the plaintiff's motion, dated May 24, 1974, seeking an Order permitting the filing of a supplemental and amended complaint;





22. the decision of Surrogate Bennett to compel discovery from defendant, Robert J. Reed, dated May 28, 1974;

23. the decision of Surrogate Bennett appointing William E. Lotz, as referee, dated May 28, 1974;

24. the affidavit of defendant Reed, sworn to July 3, 1974, served in opposition to the plaintiff's motion for permission to serve an amended and supplemental complaint;

25. the decision of the Surrogate, dated July 23, 1974, granting the plaintiff's motion for leave to serve an amended and supplemental complaint;

26. the supplemental summons and the supplemental and amended complaint herein, dated July 24, 1974;

27. the Order of this Court, dated August 6, 1974, granting the



plaintiff leave to serve an amended and supplemental complaint herein;

28. the defendant's notice of motion and affirmation of Albert J. Fiorella in support of an application to dismiss the tenth cause of action pursuant to Section 213, Subdivision 9 of the CPLR, dated October 17, 1974;

29. the notice to take deposition upon oral examination of Robert Cohen, returnable October 31, 1974, dated October 18, 1974;

30. the answer, dated October 18, 1974, of the defendants, Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Co. and Alger Realty Co., to the plaintiff's amended and supplemental complaint;

31. the answer of the defendants, Feinerman and Jasdane, dated



October 30, 1974, to the plaintiff's amended and supplemental complaint;

32. the plaintiff's verified reply to counterclaims, dated November 1, 1974;

33. the decision of Surrogate Bennett with respect to defendants' motion to dismiss and/or summary judgment, dated December 18, 1974;

34. the decision of Surrogate Bennett to accept plaintiff's Order, dated February 10, 1975;

35. the Order with notice of entry (Surrogate Bennett) to commence trial on February 25, 1975;

36. the decision of Surrogate Bennett denying defendants' motion to dismiss the tenth cause of action, dated May 22, 1975;

37. the answer of the defendants, Juan Soto, J.S.K. Cleaning Services, Inc., Elaine Wilschek, Volume



Feeding, Sheldon Katz, each dated June 6, 1975;

38. the answer of the defendants, Feinerman and Jasdane, each dated June 12, 1975;

39. the demand of the defendants', Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Aljer, dated June 13, 1975, for a bill of particulars;

40. the plaintiff's notice of motion with supporting affidavit to vacate the demand for bill of particulars, dated June 18, 1975;

41. the defendants' affidavit in opposition to plaintiff's motion for an Order vacating demand for bill of particulars, dated July 7, 1975;

42. the decision of Surrogate Bennett with respect to the motion to





vacate the demand for bill of particulars, dated July 31, 1975;

43. the Order of Surrogate Bennett, denying plaintiff's motion for an Order vacating defendants' demand for a bill of particulars;

44. the plaintiff's verified bill of particulars, dated September 3, 1975;

45. the plaintiff's cross-notice of motion and supporting affidavit to fix discovery, dated September 26, 1975;

46. the affidavit of Robert Cohen in support of the cross-motion for discovery, dated September 26, 1975;

47. the affidavit of Robert W. Corcoran in opposition to cross-motion for discovery, dated September 30, 1975;

48. the decision of Surrogate Bennett granting discovery regarding the



cross-motion by the plaintiff, dated October 7, 1975;

49. the notice of motion and supporting affidavit for defendants, Soto, et al., for a Protective Order, dated October 15, 1975;

50. the Order with notice of settlement of this Court that defendants will have until October 20, 1980 to serve any motion papers addressed to plaintiff's bill of particulars and interrogatories, dated October, 1975;

51. the Order and letter of Surrogate Bennett, granting plaintiff's cross-motion and directing the defendants to appear on October 28, 1975 for the purpose of fixing a discovery schedule, dated October 20, 1975;

52. the motion of defendants, Robert J. Reed, et al., for an Order dismissing the complaint and for summary judgment, dated October, 1975;



53. the notice of motion and affirmation in support of motion by defendants, Robert J. Reed, et. al., to strike plaintiff's interrogatories;

54. the correction of the affirmation filed in support of motion by defendants, Robert J. Reed, et. al., for an Order striking plaintiff's interrogatories, dated October 20, 1975;

55. the supplemental affidavit by Albert J. Fiorella in support of above motion by defendants, dated October 20, 1975;

56. the notice of cross-motion and affidavit of Arthur Lubell in support of defendants' motion for a Protective Order, dated October 20, 1975;

57. the affirmation by Albert J. Fiorella of a true copy of the interrogatories, dated October 21, 1975;



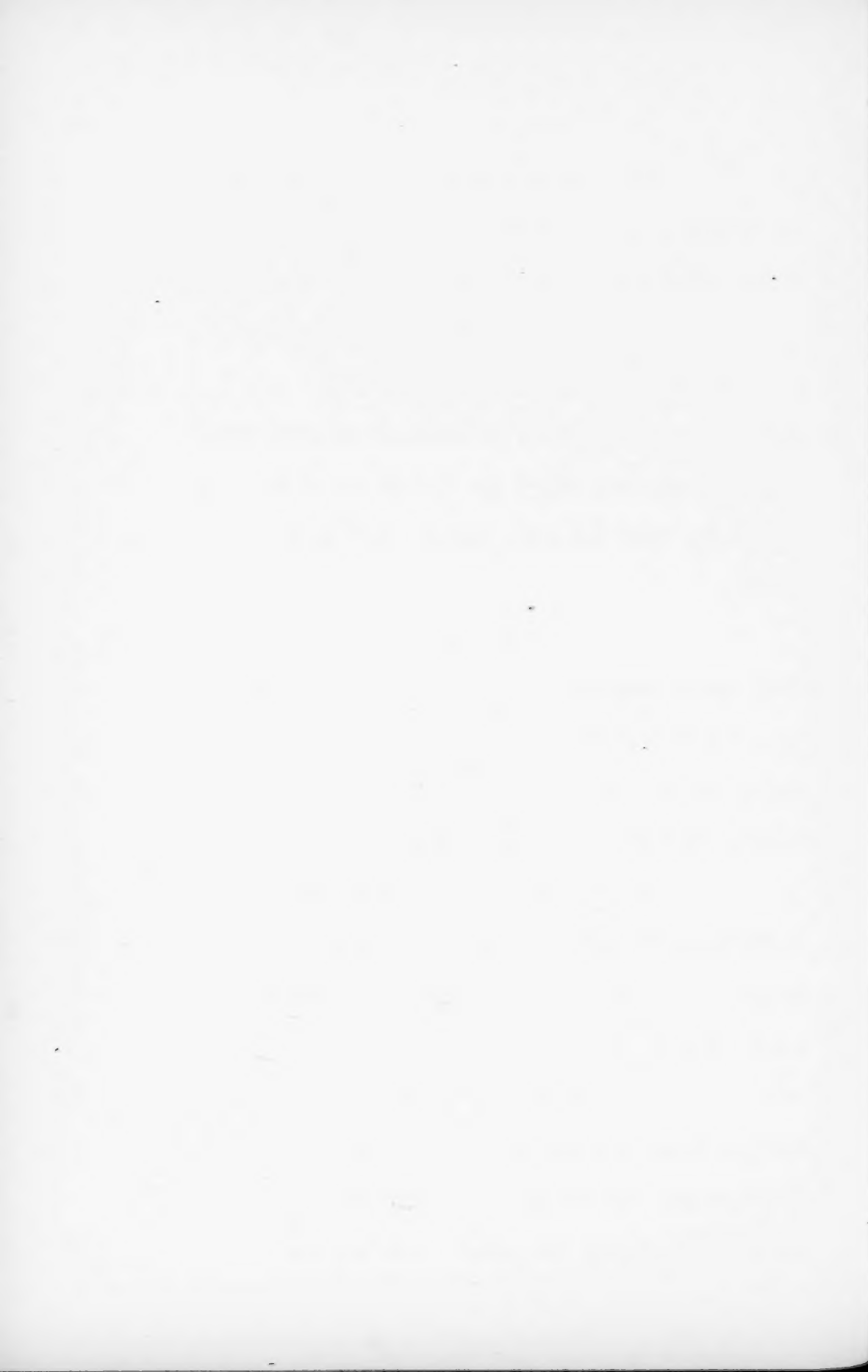
58. the plaintiff's affidavit in opposition to motion for a Protective Order striking the interrogatories;

59. the opinion of Referee Lotz stating that all documents pertaining to every partnership involved in this action must be filed in the Court by the Estate, dated March 10, 1976;

60. the decision of Referee Lotz that depositions be taken instead of interrogatories and granting defendants' motion for a Protective Order, dated April 8, 1976;

61. the Order granting defendants' motion for a Protective Order with notice of entry by Referee Lotz, dated April 30, 1976;

62. the plaintiff's notice of motion and affidavit of Stephen Hochhauser in support of plaintiff's motion pursuant to CPLR 3104(d) to





review the decision and Order of the Referee, dated April 8, 1976 and April 30, 1976, which granted the Protective Order, dated May 3, 1976;

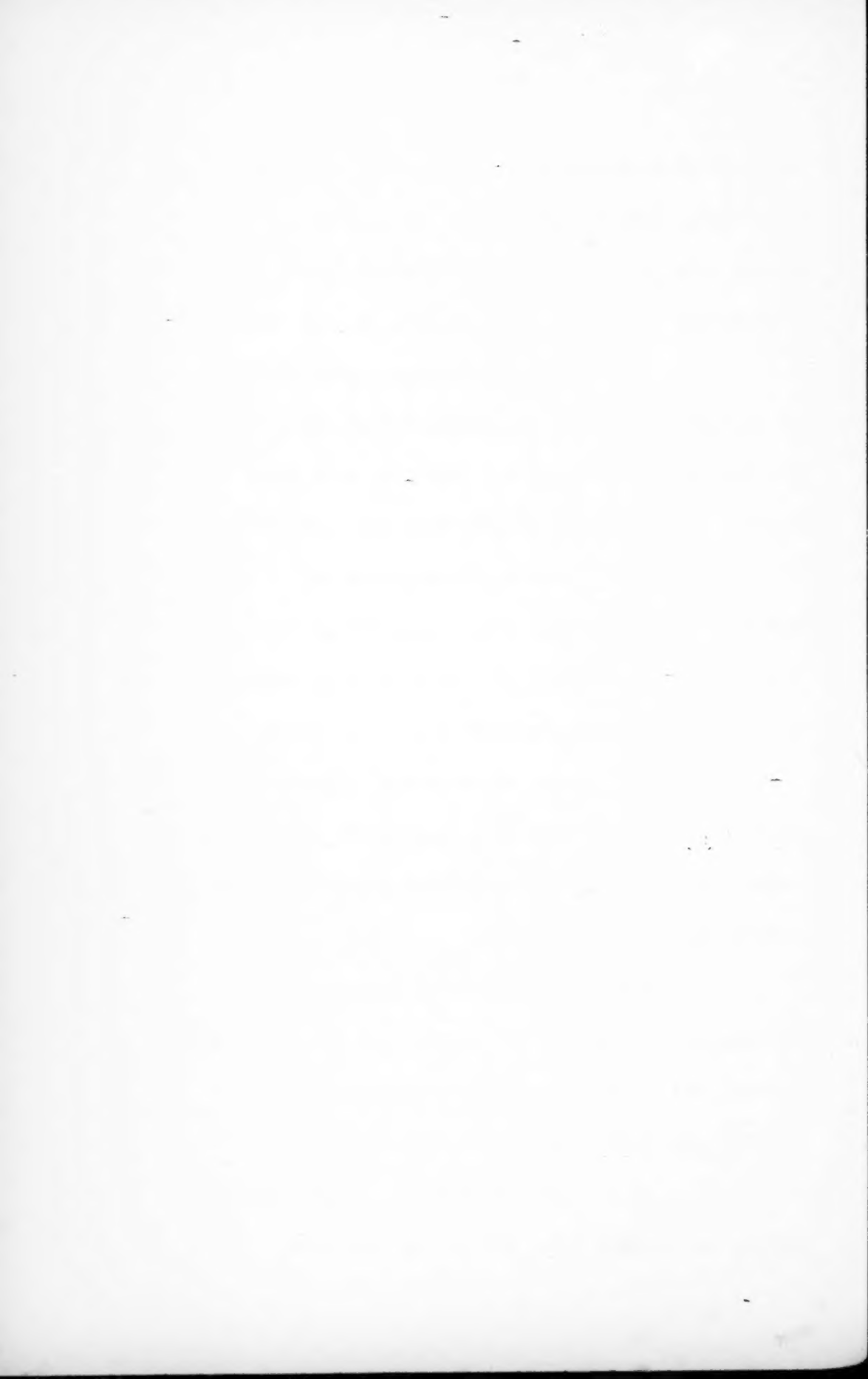
63. the answering affidavit of Arthur Lubell in opposition to plaintiff's motion to review and vacate Referee's Order, dated May 17, 1976;

64. the affirmation of Robert W. Corcoran in opposition to plaintiff's motion to review and vacate Referee's Order, dated May 26, 1976;

65. the directive from Referee Radigan to all parties for submission of pre-conference memorandum, dated June 10, 1976;

66. the affidavit of defendant, Robert J. Reed, in support of motion of defendants to dismiss complaint and for summary judgment;

67. the Order of this Court, dated December 10, 1976, directing

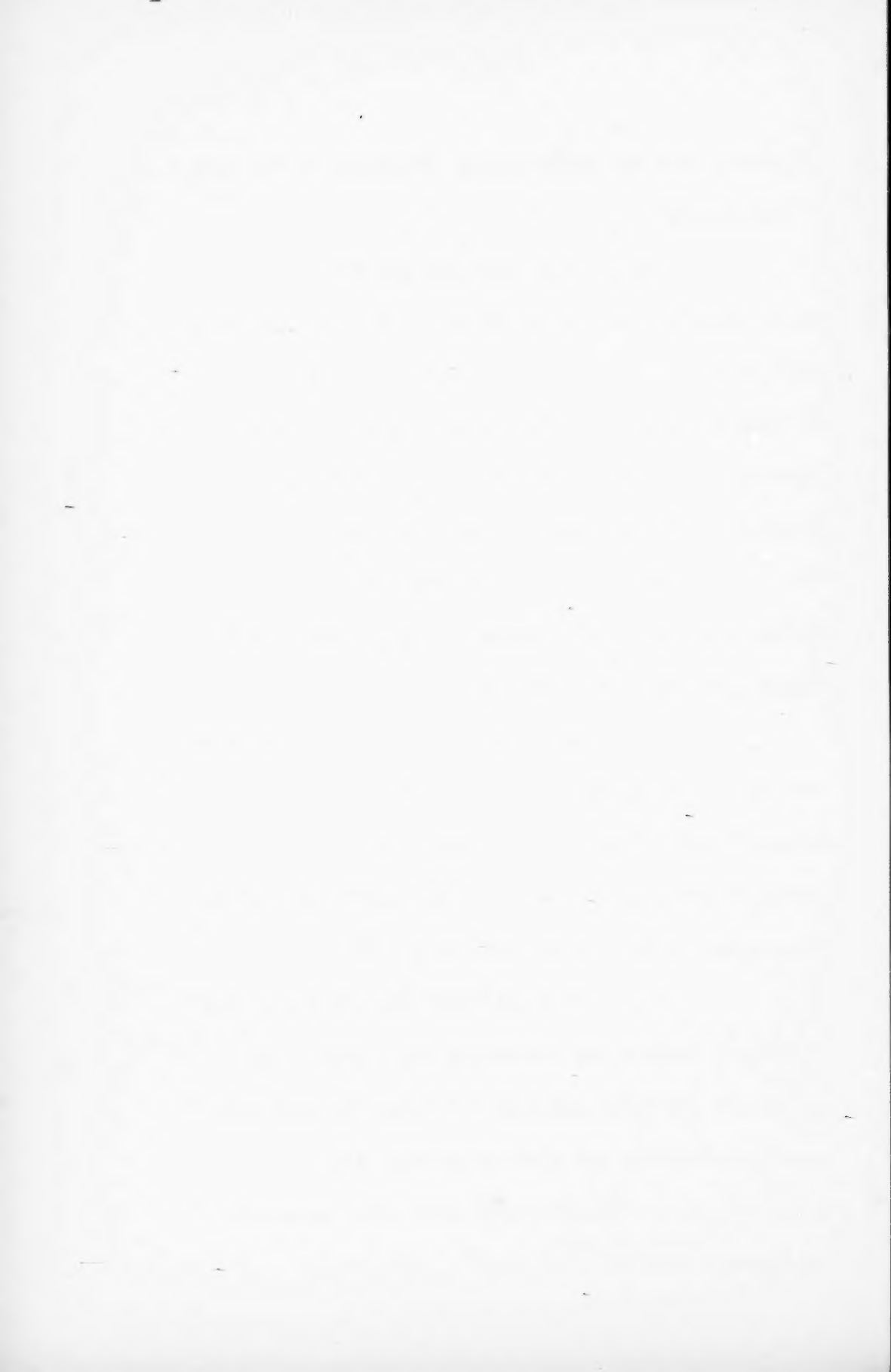


production of specified documents by the defendants;

68. the motion of the defendants, Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Alger, dated December 31, 1976, for an Order dismissing the complaint and for summary judgment, and upon the papers attached thereto;

69. the decision of Surrogate Bennett holding in abeyance the signature of either Order until determination of motion by defendants to dismiss, dated January 12, 1977;

70. the affidavit of Beatrice Potter, sworn to January 25, 1977, in support of the motion of the defendants for dismissal of the amended and supplemental complaint and for summary judgment herein;



71. the notice, dated January 31, 1977 of defendants, Soto, Wilschek, J.S.K. Cleaning Services, Inc., Katz and Volume Feeding, Inc. of joinder of in the motion of the aforesaid defendants for dismissal of the action and for summary judgment;

72. the notice, dated February 16, 1977, of the defendants' Fienerman and Jasdane, joining in the motion made by the aforesaid defendants on December 31, 1976, for dismissal of the action and summary judgment herein;

73. the decision of this Court, dated March 31, 1977, rendered in connection with the plaintiff's motion for an Order disqualifying the referee who had theretofore been appointed to supervise disclosure, and upon the Order of this Court, dated April 20, 1977, denying such motion;



74. the memorandum-decision and Order and this Court, both dated April 20, 1977;

75. the decision of this Court, dated April 24, 1977;

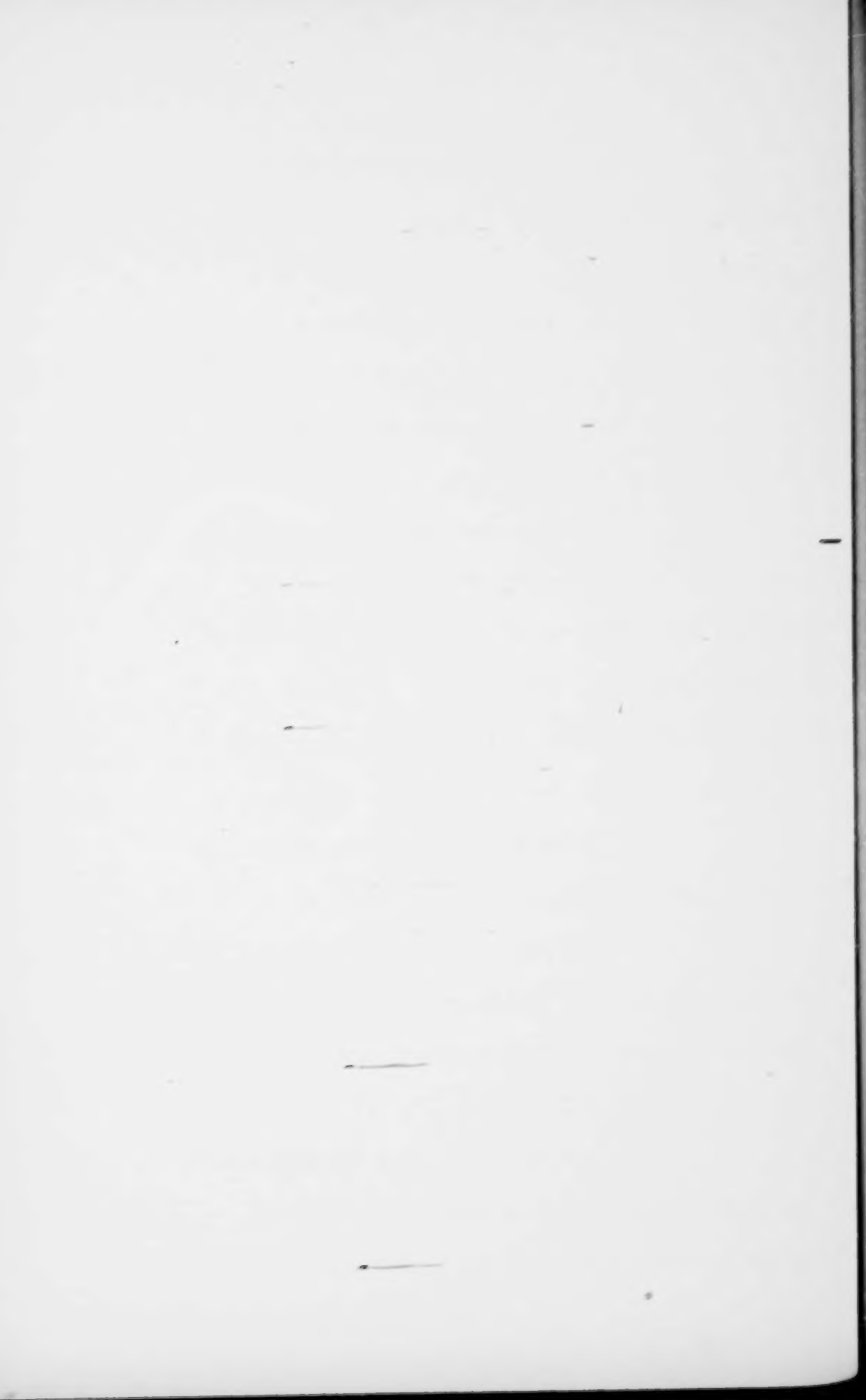
76. the Order of this Court, dated April 29, 1977;

77. the decision of Surrogate Bennett withdrawing decision, dated April 29, 1977 and directing counsel to appear May 25, 1977 to show cause why the Court should not proceed without further delay, dated May 2, 1977;

78. the decision of this Court, dated August 24, 1977;

79. the decision of Surrogate Bennett setting October 4, 1977, as date for commencing of examinations before trial, dated September 29, 1977;

80. the decision of Surrogate Bennett directing counsel to submit briefs with respect to decedent's





alleged syphoning funds, dated  
September 29, 1977;

81. the decision of Surrogate  
Bennett to sign Order of Albert J.  
Fiorella, attorney for defendants, see  
September 29, 1977 decisions, dated  
October 19, 1977;

82. the reply brief of  
Stephen Hochhauser to defendant's brief  
as basis of liability, dated December 6,  
1977;

83. the plaintiff's notice of  
motion, dated January 6, 1978, seeking  
production, discovery and inspection of  
certain documents;

84. the plaintiff's notice of  
motion for discovery and inspection,  
dated January 6, 1978;

85. the cross-motion of the  
defendants, Reed, Hackell, Potter, First  
National City Bank, Werner, Dadgab,  
Brimsco, Simon Cohen Real Estate and



Management Company, Simon Cohen Realty Company and Aljer Realty Company, dated January 30, 1978;

86. the closing affidavit of Feinerman, et al., to plaintiff's motion for discovery and inspection, dated January 31, 1978;

87. the affidavit of Stephen Hochhauser in opposition to defendants' cross-motion for adjournment of plaintiff's motion for discovery, dated February 10, 1978;

88. the reply affidavit of Robert W. Corcoran, regarding defendants' cross-motion, dated February 13, 1978;

89. the decision of this Court, dated March 2, 1978;

90. the affidavit of Robert J. Reed, requesting Court to commence subject discovery proceeding not earlier



than August 1, 1978, dated March 16,  
1978;

91. the affidavit of Stephen  
Hochhauser requesting discovery and  
inspection to proceed forthwith, dated  
March 20, 1978;

92. the decision of this  
Court, dated April 4, 1978;

93. the discovery proceedings  
conducted in this Court on April 18,  
1978; April 21, 1978 and May 3, 1978,  
and upon all of the documents and  
instruments produced in the course  
thereof;

94. the decision of Surrogate  
Bennett directing Albert J. Fiorella to  
submit documents within one month, dated  
May 18, 1978;

95. the plaintiff's amended  
and supplemental bill of particulars,  
dated July 9, 1978;



96. the defendants' discovery notice with respect to documents in possession of plaintiff, dated July 14, 1978;

97. the plaintiff's notice of motion and supporting affidavit of Hochhauser for a Protective Order relating to certain items of discovery, dated July 17, 1978;

98. the plaintiff's amended and supplemental bill of particulars, dated July 26, 1978;

99. the defendants' notice of cross-motion and supporting affirmation of Robert W. Corcoran in opposition to plaintiff's motion for Protective Order with respect to defendants' discovery notice of July 14, 1978, dated July 31, 1978;

100. the Order of this Court, dated August 18, 1978;





101. the plaintiff's notice to admit pursuant to CPLR 3123, dated September 21, 1978;

102. the plaintiff's notice to admit, dated September 21, 1978, addressed to the defendant, Potter;

103. the Order to Show Cause, signed by Surrogate Bennett, extending defendants' time to serve responding papers under CPLR 3123, dated October 5, 1978;

104. the application of the defendants, and upon the Order of this Court, dated October 23, 1978, seeking an Order permitting the oral examination before trial of the plaintiff's attorney, Stephen Hochhauser;

105. the decision of this Court, dated October 27, 1978;

106. the affidavit of Stephen Hochhauser in opposition to motion for



deposition of counsel, dated  
October 27, 1978;

107. the affidavit of  
Robert W. Corcoran, sworn to October 31,  
1978, submitted in support of the  
defendants' motion to examine Stephen  
Hochhauser;

108. the notice of motion,  
dated October 31, 1978 of the  
defendants, Soto, Wilschek, Katz, J.S.K.  
and Volume Feeding, seeking an Order  
permitting their examination before  
trial of the plaintiff's attorney,  
Stephen Hochhauser;

109. the affidavit of  
Hochhauser in opposition to motions of  
defendants to take deposition of  
plaintiff's attorney and forwarding  
letter, dated November 3, 1978;

110. the affidavit of Murray  
Koven in support of motion directing the



attorney for plaintiff to submit all examinations, dated November 6, 1978;

111. the Order of this Court, dated November 13, 1978;

112. the response, dated December 1, 1978 of the defendant, Potter to plaintiff's notice to admit;

113. the response, dated December 4, 1978 of the defendants Reed, Hackell and Citibank to plaintiff's notice to admit;

114. the decision of this Court herein, dated December 13, 1978, and the decision thereof, dated December 20, 1978;

115. the plaintiff's notice of motion and supporting affidavit to permit plaintiff ready access to defendants' relevant documents, dated January 5, 1979;

116. the affidavit of Robert W. Corcoran, sworn to the 17th



day of January, 1979, submitted in opposition to the plaintiff's application for the production of additional documents;

117. the affidavit of Stephen Hochhauser with corrections and additions to the deposition transcripts, sworn to February 16, 1979;

118. the decision of this Court, dated February 28, 1979;

119. the note of issue and statement of readiness herein filed by the plaintiff on or about March 5, 1979;

120. the motion of the defendants, dated March 7, 1979, and the Order of this Court, dated March 7, 1979, together with the papers attached thereto, directing that the plaintiff show cause why an Order should not be entered herein vacating and setting aside the plaintiff's note of issue and statement of readiness;





121. the affidavit of plaintiff, sworn to March 14, 1979, submitted in opposition to the defendants' motion for summary judgment;

122. the affidavit of Stephen Hochhauser in opposition to the motion to strike note of issue, sworn to March 15, 1979;

123. the notice of motion of the defendants, Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Aljer, dated March 19, 1979, together with the papers attached thereto;

124. the affirmation of Albert J. Fiorella, submitted in support of the defendants' motion for an application to set aside the note of issue and statement of readiness, dated March 20, 1979;



125. the stipulation of the parties herein entered into in this Court of March 21, 1979;

126. the decision of the Court herein, dated March 27, 1979;

127. the motion, dated March 28, 1979, of the defendants, Soto, Wilschek, Katz, J.S.K., Volume Feeding, to examine and make copies of the Federal and State Income Tax Returns of the plaintiff, together with the papers attached thereto;

128. the Order of this Court, dated March 29, 1979;

129. the affidavit of Stephen Hochhauser in opposition to the motion by defendants to inspect and copy plaintiff's income tax returns, dated April 4, 1979;

130. the supplemental affidavit of Stephen Hochhauser, sworn to the 4th day of April, 1979,



submitted by plaintiff in opposition to the defendants' motion for summary judgment;

131. the plaintiff's notice of motion, dated April 5, 1979, seeking production and examination of certain documents;

132. the affidavit of Bernd Bilstein, sworn to the 8th day of May, 1979, submitted by plaintiff in his opposition to the defendants' motion for summary judgment;

133. the affidavit of Arthur Press, sworn to the 12th day of May, 1979, submitted by plaintiff in opposition to the defendants' motion for summary judgment;

134. the transcript of the proceedings in this Court on May 16, 1979, held in connection with the defendants' motion for summary judgment;



135. the decisions of this Court, dated May 16, 1979 and May 18, 1979, made with respect to the defendants' motion of March 28, 1979;

136. the second supplemental affidavit of Robert Cohen opposing the motion for summary judgment, dated June 11, 1979;

137. the affidavit of Judith Feinerman, sworn to the 18th day of June, 1979, submitted in support of the defendants' motion for summary judgment;

138. the affidavit of Stephen Hochhauser re summary of plaintiff's position on the motion for summary judgment, dated June 19, 1979;

139. the affidavit of defendant Werner, submitted in support of the defendant's motion for summary judgment;

140. the affidavit of defendant Wilschek, sworn to July, 1979,





and submitted in support of defendants' motion for summary judgment;

141. the decision of Surrogate Bennett setting July 23, 1979 as final date to submit memoranda in connection with said motions, dated July 12, 1979:

142. the affidavit of defendant Hackell, duly sworn to July 23, 1979, and submitted in support of defendants' motion for summary judgment;

143. the affidavit of defendant Potter, sworn to July 23, 1979, submitted in support of defendants' motion for summary judgment;

144. the affirmation of Albert J. Fiorella, dated July 23, 1979, submitted in support of defendants' motion for summary judgment;

145. the affidavit of defendant Katz, sworn to July 23, 1979,



submitted in support of defendants' motion for summary judgment;

146. the reply affidavit of Stephen Hochhauser, sworn to July 30, 1979;

147. the reply affidavit of Sidney Hackell, sworn to August 10, 1979, submitted in support of defendants' motion for summary judgment;

148. the report of the referee herein, dated August 22, 1979;

149. the notice of motion, dated September 6, 1979, of the defendants, Fienerman and Jasdane, for an Order rejecting that part of the referee's report as recommended denial of the defendants' motion for summary judgment, and for a further Order granting summary judgment in favor of the defendants' dismissing the tenth cause of action of the amended and



supplemental complaint, together with the supporting papers attached thereto;

150. the notice of motion, dated September 11, 1979 of the defendants Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company, Aljer Realty Company, for an Order disaffirming and rejecting that report of the referee, dated August 22, 1979, which denied the defendants' motion for summary judgment;

151. the notice of motion, dated September 11, 1979, made by defendants, Soto, Wilschek, J.S.K., Katz, Volume Feeding, for an Order disaffirming and rejecting the report of the official referee, dated August 22, 1979;

152. the affidavit of Stephen Hochhauser in opposition to the motions



re reject the Referee's report, dated September 17, 1979;

153. the decision of the Court, dated November 28, 1979, affirming the recommendations of the official referee with respect to disposition of the defendants' motion for summary judgment;

154. the decision of the Court, dated December 19, 1979, with respect to the Order to be signed by the Court on its decision of November 28, 1979;

155. the Order of this Court, dated December 19, 1979, denying the defendants' motion to reject the referee's report, dated August 22, 1979, and confirming the same;

156. the Order of this Court, dated January 11, 1980, resettling the Court's Order of December 19, 1979;





157. the Order of this Court,  
dated January 28, 1980;

158. the application of the  
defendants, Soto, Wilschek, J.S.K., Katz  
and Volume Feeding, dated February 7,  
1980, seeking an Order staying the  
trial of this action pending an appeal  
from the Order of this Court denying the  
application of those defendants for  
dismissal of the tenth cause of action;

159. the application of the  
defendants, Fienerman and Jasdane,  
brought on by Order to Show Cause in the  
Appellate Division, Second Judicial  
Department, dated February 13, 1980,  
seeking a stay of the trial pending the  
appeal of those defendants from the  
Orders of this Court, dated December 19,  
1979, January 11, 1980 and January 28,  
1980;

160. the defendants' Robert J.  
Reed, et. al., notice of appeal from



part of an Order entered on January 28, 1980, dated February 7, 1980;

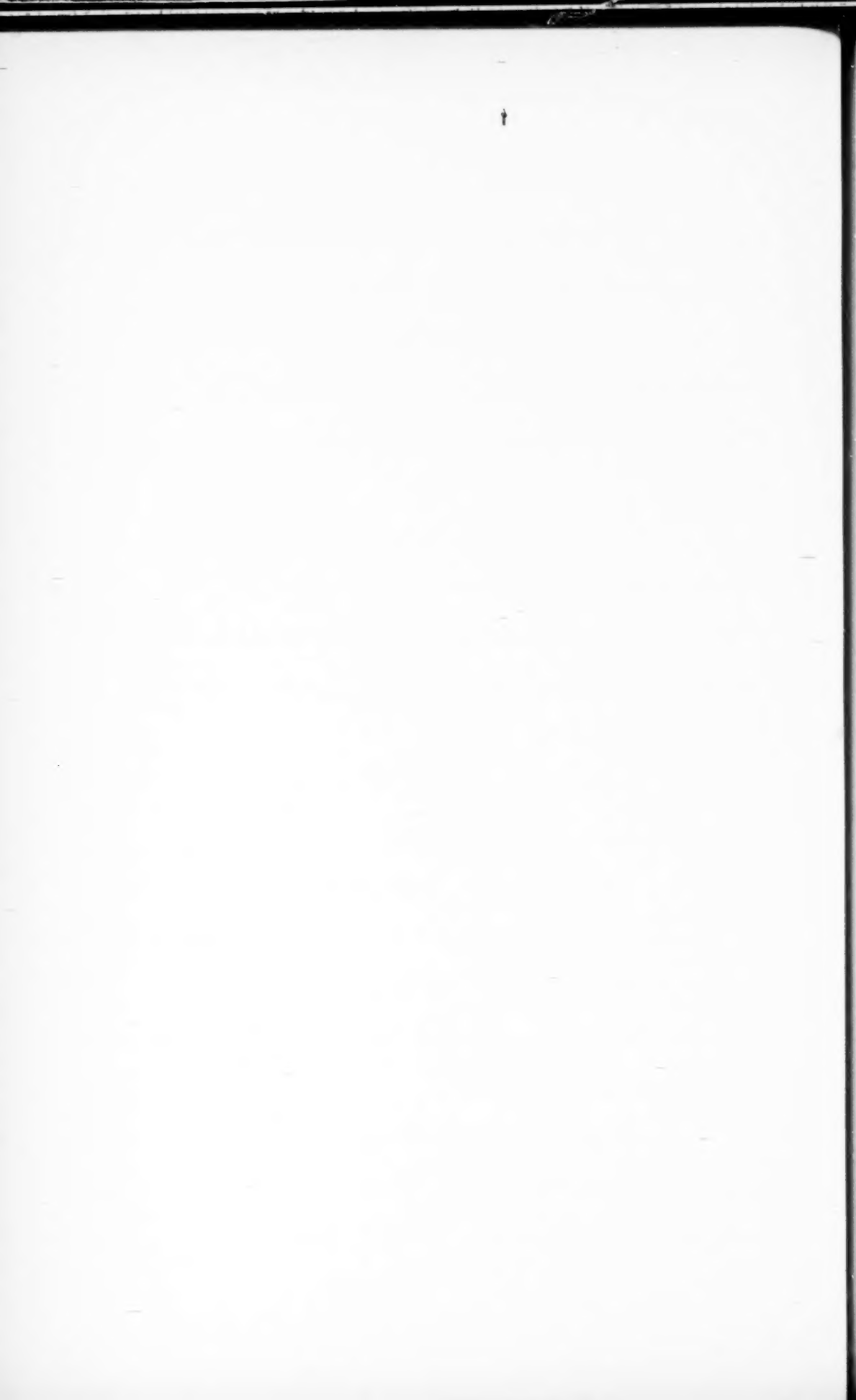
161. the affidavit of Stephen Hochhauser in opposition to motion for a stay pending appeal, dated February 13, 1980;

162. the notice of appeal and pre-argument statement of defendants, Soto, et. al., from part of a resettled Order entered on January 28, 1980, dated February 22, 1980;

163. the decision of this Court, dated April 2, 1980;

164. the transcripts of the oral pre-trial examinations of Robert Cohen, conducted during the period July 6, 1972 through and including September 20, 1978;

165. the transcripts of the oral depositions before trial of Stephen Hochhauser, conducted during the period



from January 8, 1979 through and including April 4, 1979;

166. the transcripts of the oral examinations before trial of defendant, Judah Fienerman, conducted on May 16, 1977 and October 25, 1977;

167. the transcripts of the oral examinations before trial of defendant, Juan Soto, conducted on May 9, 1977 and November 28, 1977;

168. the transcript of the oral examination before trial of defendant, Dr. William E.F. Werner, conducted on October 25, 1973;

169. the transcript of the oral examination before trial of defendant, Beatrice Potter, conducted on September 25, 1973;

170. the transcript of the oral examination before trial of Henry McKenize, conducted on September 25, 1973;



171. the transcripts of the oral examinations before trial of defendant, Sheldon Katz, conducted on May 6, 1977 and November 17, 1977;

172. the transcripts of the oral examinations before trial of defendant, Robert J. Reed, conducted on December 13, 1972, December 20, 1972, January 12, 1973, February 8, 1973, March 29, 1973, May 10, 1977.

173. the transcripts of the oral examinations before trial of defendant, Sidney Hackell, conducted on September 25, 1973 (amended by deponent's amending affidavit), May 2, 1977, May 3, 1977, May 4, 1977, May 27, 1977, June 13, 1977, October 4, 1977 and November 17, 1977;

174. the transcripts of the trial of the action conducted in this Court on various days during the period





commencing March 4, 1980 and ending October 22, 1981;

175. the Order to Show Cause, dated March 30, 1982, and the affidavit of Robert Cohen, duly sworn to March 26, 1982, in support thereof;

176. the notice of cross-motion of Robert V. Shannon, dated April 20, 1982, and the supporting affidavit of Robert V. Shannon, duly sworn to on April 21, 1982;

177. the notice of cross-motion for advice and direction of Stephen Hochhauser, dated April 21, 1982, and the affirmation of Stephen Hochhauser, dated April 21, 1982, in support thereof;

178. the affidavit of Robert W. Corcoran, duly sworn to on April 26, 1982, submitted in connection with the application of plaintiff for substitution of attorneys;



179. the affirmation of Morris Rochman, dated April 30, 1982, submitted in connection with the plaintiff's Order to Show Cause, dated March 30, 1982;

180. the affidavit of Robert Cohen in reply and in opposition to Hochhauser's cross-motion for advice and direction, duly sworn to May 1, 1982;

181. the affidavit of Robert W. Corcoran, duly sworn to May 7, 1982, submitted in response to the affirmation of Morris Rochman, dated April 30, 1982;

182. the affirmation of Morris Rochman, dated May 10, 1982, replying to the affidavit of Robert W. Corcoran, sworn to May 7, 1982;

183. the decision of the Court, dated August 2, 1982;

184. the notice of motion made by Morris Rochman, dated August 16, 1982



and his supporting affirmation, dated August 16, 1982;

185. the Order of the Court, entered August 17, 1982;

186. the Order of this Court, signed by Surrogate Radigan re hearing of October 4, 1982, dated August 23, 1982;

187. the notice of appeal and pre-argument statement by Robert Cohen, dated September 15, 1982;

188. the Order to Show Cause, dated September 21, 1982 and affidavit of plaintiff, Robert Cohen, sworn to September 20, 1982 in support thereof;

189. the affidavit of Stephen Hochhauser, sworn to September 21, 1982;

190. the notice of Surrogate Radigan to all counsel re rulings at scheduled hearing of October 4, 1982, dated September 21, 1982;



191. the reply affirmation of Michael E. Schoeman, dated September 23, 1982;

192. the affirmation of Michael E. Schoeman, dated September 24, 1982, submitted in connection with Morris Rochman's notice of motion, dated September 14, 1982;

193. the affirmation in opposition of Stephen Hochhauser, dated September 24, 1982;

194. the affidavit in opposition of Murray T. Koven, sworn to September 24, 1982;

195. the affidavit in opposition of Robert W. Corcoran, sworn to September 28, 1982;

196. the affirmation of Morris Rochman, dated September 28, 1982;

197. the letter of Robert W. Corcoran to Stephen Hochhauser re





corrections to affidavit, dated  
September 29, 1982;

198. the decision of the  
Surrogate, dated October 1, 1982, in  
connection with the motion by the  
plaintiff for an Order directing that  
the Court be disqualified;

199. the Order of the Court,  
dated October 1, 1982;

200. the offer of the  
defendants to settle this action upon  
the terms contained in the proposed  
stipulation submitted to the Court in  
October, 1982;

201. the offer of settlement  
of plaintiff, Robert Cohen, dated  
October 4, 1982;

202. the affidavit of Stephen  
Hochhauser in opposition to motion for  
stay and in support of cross-motion for  
injunction, pendente lite, dated  
October 6, 1982;



203. the answering affirmation  
of Michael E. Schoeman, dated  
October 11, 1982;

204. the notice of motion of  
Michael E. Schoeman re substitution of  
attorneys for plaintiffs, dated  
December 17, 1982;

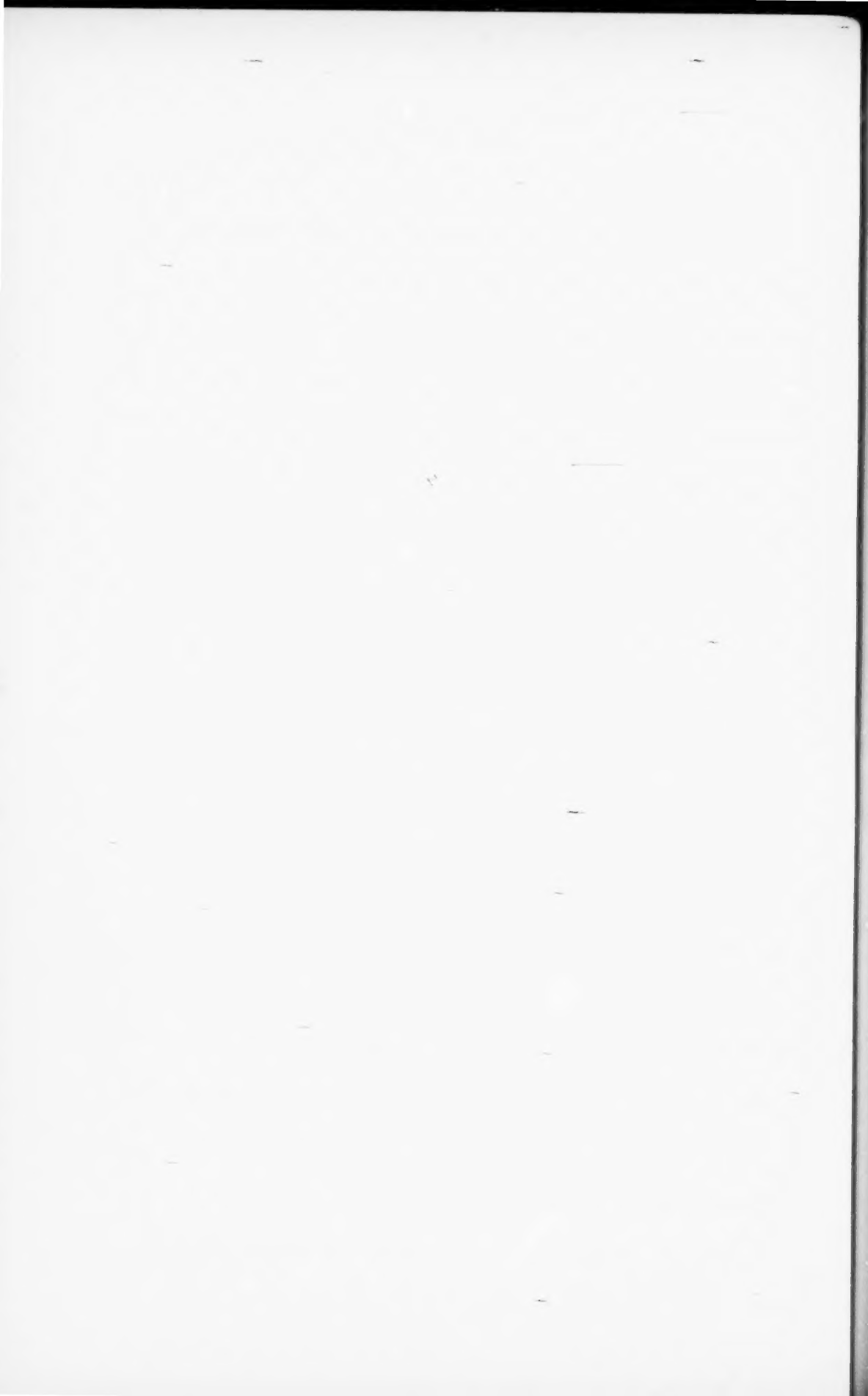
205. the affirmation of  
Stephen Hochhauser in opposition to  
motion by Robert Cohen, dated  
December 24, 1982;

206. the affidavit of  
Michael E. Schoeman in reply to Stephen  
Hochhauser's affidavit, dated  
December 29, 1982;

207. the notice of settlement  
offer to partners, dated January 13,  
1983, prepared and mailed by the Court;

208. the decision of the  
Court, dated January 18, 1983;

209. the decision of Surrogate  
Radigan re motion to compel and settle



Order on five-days' notice, dated  
January 24, 1983;

210. the Order of the Court,  
entered February 25, 1983;

211. the decision of Surrogate  
Radigan re turnover of books, documents,  
computer files, dated March 7, 1983;

212. the Order of the Court,  
entered March 9, 1983;

213. the decision of the  
Court, dated April 6, 1983;

214. the affirmation of  
Michael E. Schoeman, dated April 7,  
1983, opposing the proposed retention by  
Morris Rochman of Stephen Hochhauser,  
and in connection with Morris Rochman's  
application for permission to obtain an  
accountant;

215. the reply affirmation of  
Morris Rochman, dated April 12, 1983, in  
connection with his application for  
permission to retain an accountant and



to engage the services of Stephen  
Hochhauser;

216. the reply affirmation of  
Morris Rochman, dated April 12, 1983;

217. the plaintiff's  
affidavit, sworn to May 20, 1983, in  
opposition to defendants' settlement  
proposal;

218. the affirmation of  
Michael E. Schoeman, dated June 1, 1983,  
in opposition to defendants' settlement  
proposal;

219. the affidavit of  
Robert J. Reed, sworn to June 2, 1983,  
in response to plaintiff's affidavit in  
opposition to defendants' settlement  
proposal;

220. the Court's decision of  
June 22, 1983;

221. the consent of the  
defendants, Robert J. Reed, Sidney  
Hackell, Beatrice Potter, First





National City Bank, Dr. William E.F. Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Aljer, and their acceptance of those conditions of settlement specified in the decision of this Court, dated June, 1983;

222. the response to the Court's decision of June 22, 1983 of defendants, Judah Feinerman and Jasdane, Inc., dated July 11, 1983;

223. the consent of the defendants', Soto, Wilschek, J.S.K., Katz and Volume Feeding, with the conditions of settlement specified in the Court's decision of June 22, 1983;

224. the defendant's consent to modification of settlement offer, dated July 13, 1983;

225. the affidavit of Robert Cohen, sworn to July 20, 1983, in



response to Surrogate's decision, dated June 22, 1983;

226. the affirmation of Michael E. Schoeman, dated July 22, 1983, in response to the Court's decision of July 22, 1983;

227. the affidavit of Robert W. Corcoran, sworn to July 25, 1983;

228. the decision of Surrogate Radigan not to submit Order, dated July 28, 1983;

229. the responses received from the partners;

230. the Order of the Court, entered August 9, 1983;

231. the plaintiff's notice of motion, dated September 1, 1983, seeking an Order modifying or resettling the Court's Order of August 9, 1983, together with the supporting affidavit or affirmation of Michael E. Schoeman, dated September 1, 1983;



232. the notice of motion of plaintiff, Robert Cohen, dated September 1, 1983, for an Order modifying or resettling the Court's Order of August 9, 1983, and affirmation of Michael E. Schoeman, dated September 1, 1983 in support thereof;

233. the notice of motion of Michael E. Schoeman for an Order modifying or resettling the Order, dated August 9, 1983, with affirmation of Michael E. Schoeman and Order of Surrogate Radigan attached, dated September, 1983.

234. the plaintiff's notice of motion and supporting affidavit of Michael E. Schoeman, both dated September 6, 1983, seeking an Order directing the Clerk of Court to prepare and transmit certain papers to plaintiff.



235. the Order to Show Cause, dated September 8, 1983 for re-argument and resettlement of the Court's Order, entered August 9, 1983 and affidavit of Robert W. Corcoran, sworn to September 8, 1983 in support thereof;

236. the affirmation of Michael E. Schoeman, dated September 16, 1983, in opposition to motion to modify and resettle Order;

237. the affidavit of Robert W. Corcoran, sworn to September 20, 1983, in response to affirmation of Michael E. Schoeman, dated September 16, 1983;

238. the decision of this Court, dated December 2, 1983, denying plaintiff's motion for an Order directing the Court to photocopy pleadings, answers, motions and responses to motions for the plaintiff;





239. the plaintiff's notice of motion, dated December 9, 1983, and supporting affirmation of Michael E. Schoeman, seeking modification or resettlement of the Court's Order of August 9, 1983;

240. the affidavit of Robert W. Corcoran, sworn to December 21, 1983, in further support to motion to reargue and resettle;

241. the decision of this Court, dated January 6, 1984, denying as moot the plaintiff's motion for an Order compelling this Court to render a decision on the plaintiff's motion to resettle the Order of August 9, 1983;

242. the decision of this Court, dated January 6, 1984;

243. the plaintiff's notice of motion for a new trial, dated January 31, 1984, and affidavit of



plaintiff, Robert Cohen, sworn to  
January 30, 1984, in support thereof;

244. the stipulation of  
acceptance of terms of proposed  
settlement of defendants, Volume  
Feeding, Sheldon Katz, J.S.K. Cleaning,  
Juan Soto and Elaine Wilschek, dated  
January 25, 1984;

245. the plaintiff's refusal  
to accept the defendants' said proposal  
of settlement;

246. the defendants'  
acceptance, dated February 8, 1984 of  
three conditions of settlement referred  
to in this Court's Order, entered  
August 9, 1983 and this Court's  
decision, dated January 6, 1984;

247. the affirmation of Steven  
Louros, dated February 9, 1984, in  
opposition to motion for a new trial;



248. the affirmation of Lubell & Koven in opposition to motion for a new trial, dated February 9, 1984;

249. the affidavit of Robert J. Reed in opposition to plaintiff's motion for a new trial, dated February 10, 1984;

250. the affirmation of Albert J. Fiorella, dated February 14, 1984, in opposition to application for a new trial;

251. the affidavit of Robert J. Reed, sworn to February 10, 1984, in opposition to plaintiff's motion for a new trial;

252. the decision of this Court, dated April 27, 1984;

253. the plaintiff's notice of motion, dated April 27, 1984, seeking an Order compelling the Surrogate to issue an Order determining the plaintiff's motion for a new trial, together with



the supporting affidavit of Michael E. Schoeman, dated April 27, 1984;

254. the affirmation of Albert J. Fiorella, opposing the plaintiff's motion for an Order directing the Surrogate to render a decision on his application for a new trial;

255. the Decision/Order of this Court, dated May 10, 1984, denying plaintiff's motion for a new trial;

256. the Order of Surrogate Radigan rejecting all proposed Orders and Counter-orders re April 27, 1984 decision;

257. the Order of this Court, dated July 23, 1984, denying plaintiff's motion for a new trial;

258. the transcript of the trial conducted herein, and the evidence introduced in the course thereof; and





upon all of the pleadings and proceedings heretofore had herein; it is

ORDERED, ADJUDGED AND DECREED, that the above-entitled action, other than the plaintiff's seventeenth cause of action, is settled and discontinued with prejudice; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the Estate of Simon Cohen shall pay as its contribution to such settlement, and as discharge of all of its obligations for any attorney's fees and expenses which may be allowed to plaintiff, the sum of Three Hundred Eighteen Thousand Four Hundred Twenty-Seven and 00/100 (\$318,427.00) Dollars; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the executors of the Estate of Simon Cohen shall, collectively, pay, as their contributions to said settlement, and as discharge of all of their



obligations for any attorney's fees and expenses which may be allowed to plaintiff, the sum of One Hundred Twenty-five Thousand and 00/100 (\$125,000.00) Dollars; said payment to be made upon their receipt of executor's commissions from the Estate of Simon Cohen in the same amount, to wit, the sum of One Hundred Twenty-five Thousand and 00/100 (\$125,000.00) Dollars; and, it is, further

ORDERED, ADJUDGED AND DECREED, that there shall forthwith be paid collectively to the executors on account of their commissions as executors of the Estate of Simon Cohen, the sum of One Hundred Twenty-five Thousand and 00/100 (\$125,000.00) Dollars.  
and, it is, further

ORDERED, ADJUDGED AND DECREED, that the following named defendants shall collectively pay as their



contributions to said settlement, and as discharge of all of their obligations for any attorney's fees and expenses which may be allowed to plaintiff, the sum of Seventy-five Thousand and 00/100 (\$75,000.00) Dollars:

- (a) Juan Soto and J.S.K.  
Cleaning Services, Inc.
- (b) Sheldon Katz and Volume  
Feeding, Inc.
- (c) Judah Feinerman and  
Jasdane, Inc.
- (d) William B.F. Werner  
d/b/a Mid-Island Hospital

and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that the aforesaid total of Five Hundred Eighteen Thousand Four Hundred Twenty-seven and 00/100 (\$518,427.00) Dollars, when paid by the defendants as above directed, shall be distributed as follows:

- (a) to Simon Cohen  
Company \$ 18,427.00
- (b) to Simon Cohen



Realty Company and to Simon Cohen Real Estate and Management Company	\$500,000.00
---	--------------

and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that defendants, Reed, Potter and the  
Estate of Simon Cohen, shall not share  
in any of the monies paid to Simon Cohen  
Real Estate and Management Company or  
Simon Cohen Realty Company as above  
provided; and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that defendants Reed, Hackell, Potter  
and Citibank, upon approval of their  
accounting as trustees of the trust for  
Robert Cohen established under the Last  
Will and Testament of Simon Cohen, shall  
resign as trustees thereof; and, it is,  
further

ORDERED, ADJUDGED AND DECREED,  
that a hearing will be held by the Court





on the 4th day of February, 1985, 9:30 A.M. to determine what portion of the aforesaid Five Hundred Thousand and 00/100 (\$500,000.00) Dollars shall be allotted to Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company, and what portion thereof, if any, shall be allotted to the payment of attorney's fees for services rendered to the partnerships and, what, if any, reimbursement should be made to the representative plaintiff for attorneys fees and expenses paid on behalf of the partnerships; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the defendants, Citibank and Hackell, upon their final accounting as executors of the Estate of Simon Cohen, and their concurrent accounting as trustees of the trusts established thereunder, and upon approval of such



accountings, shall resign as trustees of all of the trusts of which they are named trustees; and, it is, further

ORDERED, ADJUDGED AND DECREED, that where appropriate under the provisions of the Last Will and Testament of decedent Simon Cohen, the Surrogate will designate replacement trustees; and, it is, further

ORDERED, ADJUDGED AND DECREED, that an appropriate instrument dissolving the partnership known as Simon Cohen Company shall be executed by all the partners thereof, and shall be duly filed. In the event that any partner fails or neglects to execute such dissolution instrument, then the County Clerk of Nassau County, shall file the said certificate of cancellation; and, it is, further



ORDERED, ADJUDGED AND DECREED,  
that upon dissolution of Simon Cohen  
Company:

(a) each of the partners  
shall be deemed to have released all of  
the other partners from any and all  
obligations and liabilities arising from  
the operation of the partnership or from  
their relationship thereto as partners;

(b) upon dissolution, capital  
interest of the partners shall be as  
shown on the books of the partnership,  
as of December 31, 1970; and,

(c) all net income earned  
since January 1, 1971, shall be  
distributed equally among the partners,  
other than the Estate, in accordance  
with their capital ratio, as determined  
by the partnership agreement filed in  
the Nassau County Clerk's Office; and,  
it is, further



ORDERED, ADJUDGED AND DECREED,  
that should the plaintiff fail or refuse  
to execute and deliver to the Court the  
reconstituted partnership agreement for  
Simon Cohen Realty Company, which  
reconstituted agreement was received in  
evidence during the course of this trial  
as Plaintiff's Exhibit "18", the same  
shall be filed nonetheless by the County  
Clerk of the County of Nassau; and, it  
is, further

ORDERED, ADJUDGED AND DECREED,  
that with respect to any limited  
partnership interest in Simon Cohen  
Realty Company which is held by the  
Estate of Simon Cohen, the said Estate  
will not, in any vote or election, other  
than a vote for selection of a general  
partner, be entitled to vote its  
interest as limited partner; and, it is,  
further





ORDERED, ADJUDGED AND DECREED,  
that the monies paid by defendants',  
Reed, Hackell, Potter and Citibank, as  
above directed, for the settlement of  
this litigation shall be deemed their  
full contributions to the attorneys'  
fees expended in the defense of this  
action; and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that the status of defendant, Reed, as  
managing general partner of SCREAM, is  
hereby confirmed; and, it is, further

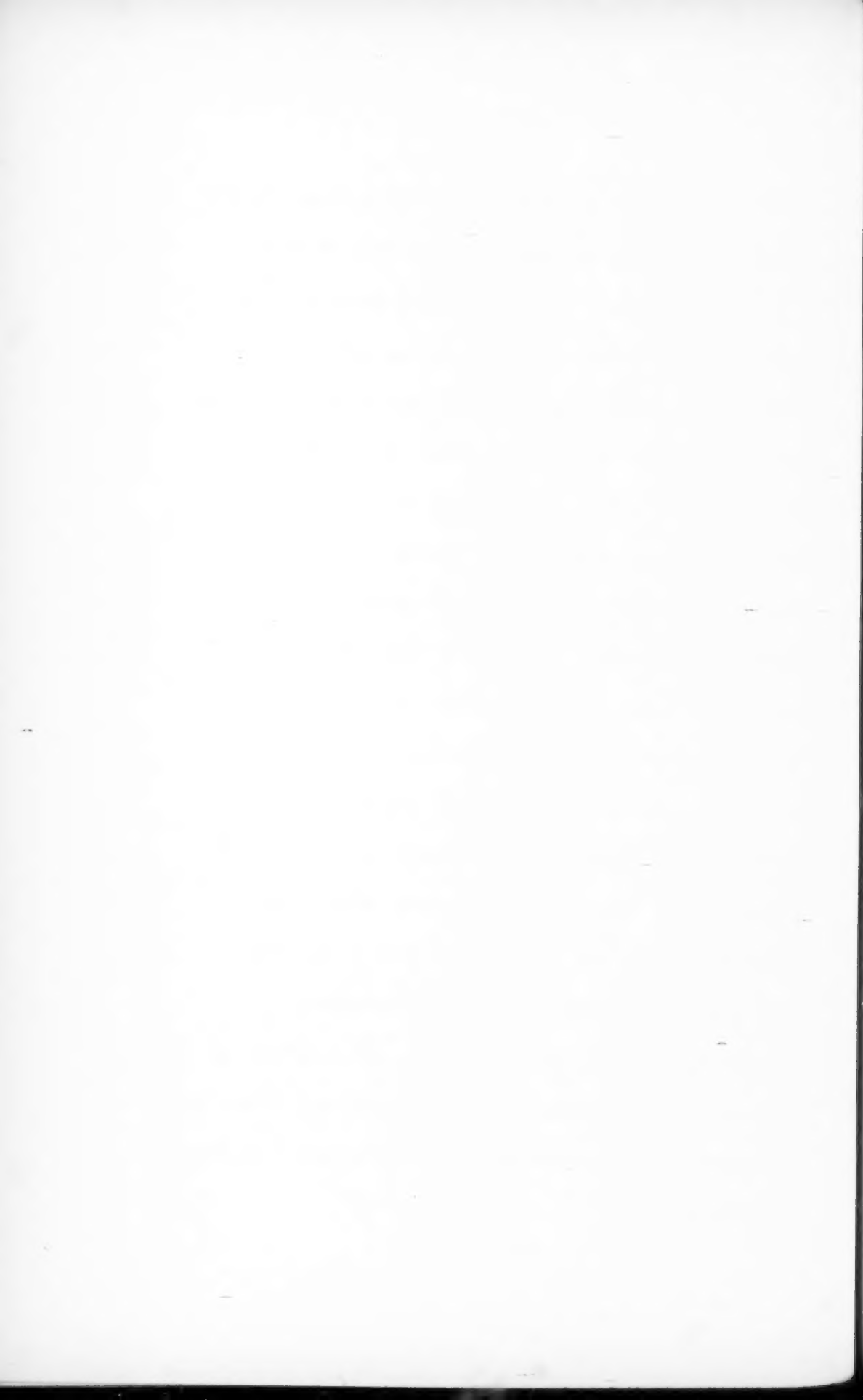
ORDERED, ADJUDGED AND DECREED,  
that the lease agreement between  
defendant, William B.F. Werner d/b/a  
Mid-Island Hospital, and Simon Cohen  
Real Estate and Management Company, be  
deemed amended so as to provide:

(a) the hospital shall  
make no loans to its Executive Director,  
to any member of its Board of Governors,



or to persons in the immediate family of said Director or members of the Board;

(b) all drawings of Dr. Werner, heretofore paid, are approved, and his further drawings, or that of his successor in interest, may be fixed by the hospital's Board of Governors, but shall not be increased more than ten (10%) percent in any year over the amount therefore paid in the prior year. In no event, however, shall the increase in any year exceed the increase in cost of living, using 1980 as the base year. Anything to the contrary notwithstanding, Dr. Werner shall be entitled, in addition to his drawings, for reimbursement for any amounts required to be paid by him as income or other taxes assessed by reason of his operation or ownership of the Mid-Island Hospital;

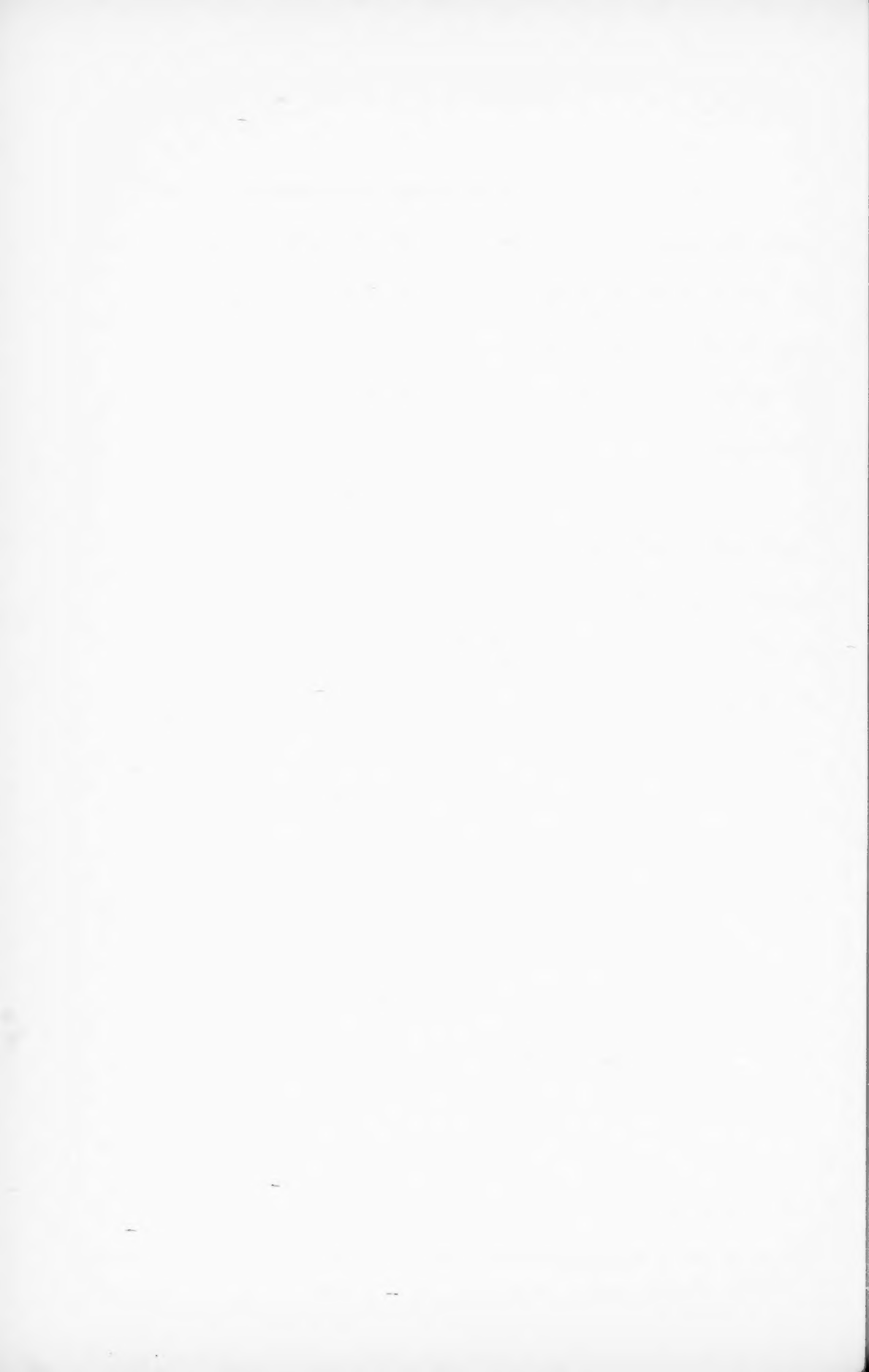


(c) the hospital shall make no contributions, except to persons or entities related to or performing services for the hospital, and justified by good business practice; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any partner of Simon Cohen Real Estate and Management Company, upon written request, shall be entitled to a true copy of each of the annual certified financial statements of Mid-Island Hospital; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any partner upon request shall be entitled to a true copy of the annual reports of the audit of the hospital by Blue Cross and/or Medicare, or any other reimbursing agency; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any partner of Simon Cohen Real Estate and Management Company, at his



own cost and expense, shall be permitted to cause an audit of the hospital's books and records for the current and any future year to be made, pursuant to terms and conditions to be agreed by the partner so requesting the same, and management of the hospital, and if they cannot agree, then on terms ordered by the Surrogate, who will retain jurisdiction to resolve any such conflicts; and, it is, further

ORDERED, ADJUDGED AND DECREED, that upon the written request of twenty-five (25%) percent of the limited partners in Simon Cohen Real Estate and Management Company an audit of the hospital's books and records for the current and any future years may be made, at the expense of Simon Cohen Real Estate and Management Company, pursuant to terms and conditions to be agreed to by the partners so requesting the same,





and management of the hospital, and if they cannot agree, then on terms ordered by the Surrogate, who will retain jurisdiction to resolve any such conflicts; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any audit conducted as hereinbefore provided, shall be carried out in a manner that will not interfere with the orderly conducted of the business of the hospital; and, it is, further

ORDERED, ADJUDGED AND DECREED, that no conduct which shall have been the subject of this litigation shall be used as the basis by any party to this litigation for denying the executors any commissions due to them upon their accounting; and, it is further

ORDERED, ADJUDGED AND DECREED, that the partners of Aljer Realty Company, Simon Cohen Realty Company and Simon Cohen Real Estate and Management



Company shall be afforded, upon their written request at reasonable times, access to the books and records of the partnerships of which they are partners; and, it is, further

ORDERED, ADJUDGED AND DECREED, that henceforth semi-annual accountings shall be prepared for Aljer Realty Company, Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company, and that copies thereof will be furnished to the partners of the respective partnerships; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any salary or distribution by Mid-Island Hospital to William B.F. Werner, shall be disclosed; and, it is, further

ORDERED, ADJUDGED AND DECREED, that if plaintiff and defendants cannot agree as to plaintiff's status as a partner in Simon Cohen Real Estate and

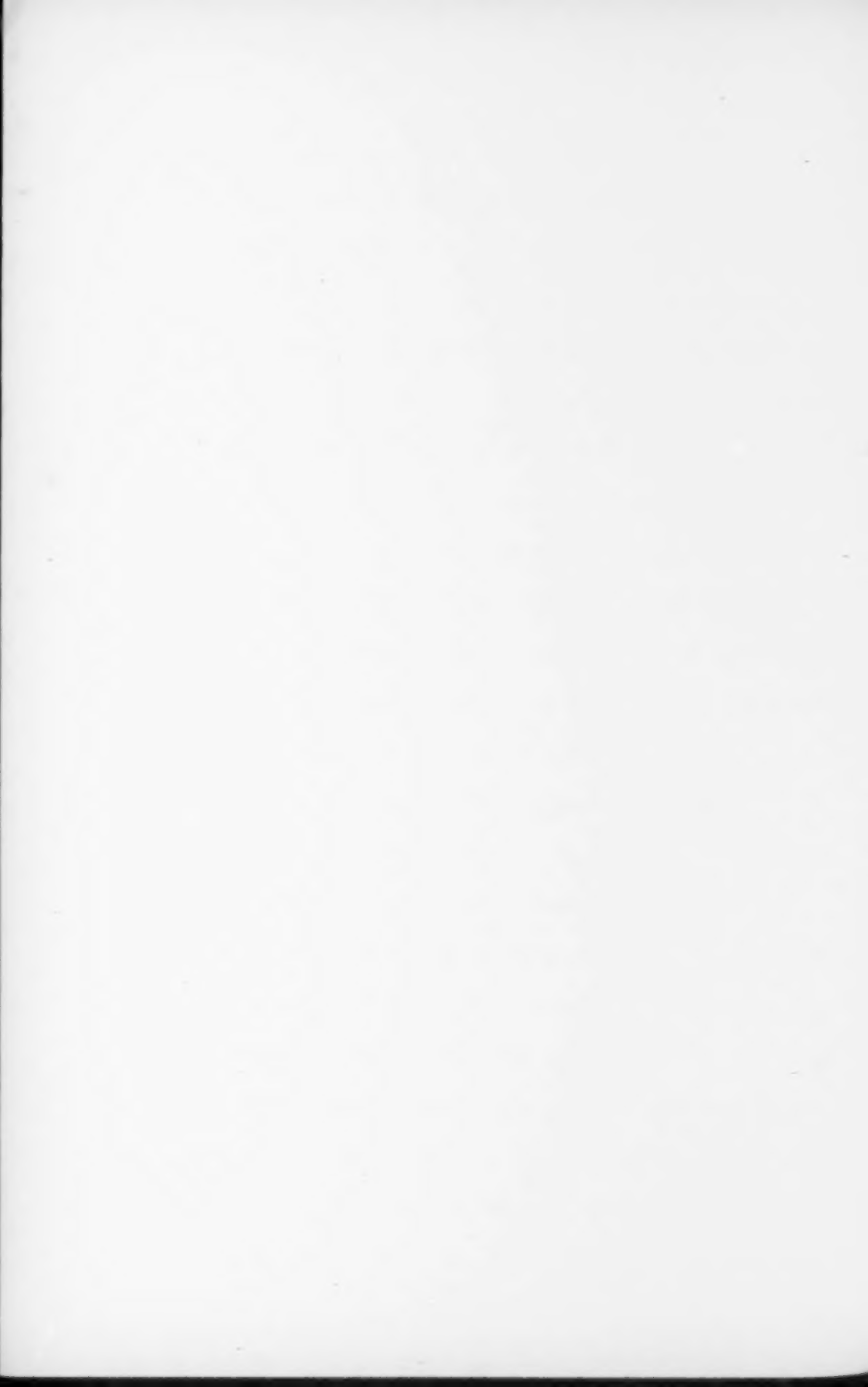


Management Company, the Court will continue to take evidence on that issue, as well as on the matter set forth under Article Seventeenth of the plaintiff's complaint; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the settlement and dismissal of this action, as above decreed, is intended to encompass all of the issues raised, or which could have been raised, in this litigation; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the settlement and dismissal of this action, as above decreed, is intended to encompass all of the issues raised, or which could have been raised, in this litigation; and, it is, further

ORDERED, ADJUDGED AND DECREED, that a copy of the Court's Decision of April 27, 1984 shall be mailed to each of the partners of the plaintiff partnerships, the cost of which is to be



borne solely by the defendants, and defendants are hereby directed to deposit with the Chief Clerk of the Surrogate's Court the sum of Three Hundred and 00/100 (\$300.00) Dollars to cover the cost thereof.

Dated: Mineola, New York  
November 27, 1984.

/s/ C. Raymond Radigan  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : AD2d  
Estate Co., et al.,  
: 3666 E  
Plaintiffs- : 3666 AE  
Appellants, : A-3/24/86  
- against - :

ROBERT J. REED, et al.,:

Defendants- :  
Respondents.

-----X

Schoeman, Marsh, Updike & Welt, New  
York, N.Y. (Michael E. Schoeman and Beth  
L. Kaufman of counsel), for appellants.

Speno, Goldberg, Moore, Margules &  
Corcoran, Mineola, N.Y. (Debevoise &  
Plimpton [Robert W. Corcoran] of  
counsel), for respondents Robert Reed,  
Sidney Hackell, Citibank, Beatrice  
Potter, William B. F. Werner,  
Individually and D/B/A Mid-Island  
Hospital, Dadgab, Inc., Brimco, Inc.,  
Simon Cohen Real Estate Co. and Aljer  
Realty Co.

Albert J. Fiorella, Mineola, N.Y.  
(Edward F. Hayes III and John P. McEntee  
on the brief), for respondents Juan  
Soto, Elaine Wilscheck, J.S.K. Cleaning  
Services, Inc., Sheldon Katz and Volume  
Feeding, Inc.



In an action, inter alia, to recover damages for diversion of partnership assets, the plaintiffs appeal from (1) an order of the Surrogate's Court, Nassau County (Radigan, S.), dated July 23, 1984, which denied their motion for a new trial, (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall resume.

Order and decree affirmed.

One bill of costs is awarded to the respondents Reed, Hackell, Citibank, Potter, Werner, Dadgab, Inc., Brimco, Inc., Simon Cohen Real Estate Co., Aljer Realty Co., Soto, Wilschek, J.S.K. Cleaning Services, Inc., Katz and



Volume Feeding, Inc., appearing separately and filing separate briefs.

The Surrogate is directed to resume the trial on the seventeen the cause of action with all convenient speed.

The instant action was commenced by the decedent Simon Cohen's son individually and as a general and limited partner, on behalf of various partnerships. The complaint essentially alleges that the decedent conspired with the individual defendants to divert assets from the partnerships, perpetrate a fraud on the partners and waste and mismanage partnership assets. In addition, the complaint charges the executors of the decedents' estate with covering up these alleged wrongdoings. The action, originally brought in the Supreme Court, Nassau County, was transferred to the Surrogate's Court,



Nassau County, by order entered December 1, 1971. After a lengthy discovery period, then Surrogate Bennett, in an order dated January 11, 1980, dismissed the first and third causes of action on the ground that they were barred by the Statute of Limitations.

A trial commenced before then Referee Radigan in March of 1980 and continued until October of the following year, at which time, although the plaintiffs had not finished presenting their direct case, it was adjourned without a date for resumption. Prior to the adjournment, the plaintiffs moved, inter alia, for leave to substitute another attorney for the attorney of record. That branch of the plaintiffs' motion which sought the substitution was granted by order dated March 9, 1983.





In the meantime, settlement negotiations were taking place, and, in October of 1982, the plaintiffs submitted a proposed settlement to Surrogate Radigan. The defendants responded by submitting a counter-proposal. At a subsequent conference, the court informed the parties that it intended to send out a notice of settlement offer to the partners, incorporating therein the terms of the counterproposal. The notice was dated January 13, 1983, and provided for responses to be sent to the court.

In its decision dated April 6, 1983, the court analyzed the responses received from the partners, most of which were favorable, and ordered a hearing to give any objectors an opportunity to show cause why the proposed settlement should not be approved. The only partner to appear at



the hearing was the plaintiff Robert Cohen, who opposed the settlement proposal. Three conditions, proposed by various partners in response to the notice of settlement offer, were added to the settlement proposal with the defendants' consent, and the amended proposal was approved by the court in its decision dated April 27, 1984. The plaintiffs then moved for a new trial on the 16 causes of action asserted on behalf of the partnerships, as well as on the seventeenth cause of action, which the plaintiff Robert Cohen asserted individually, on the basis that the inordinate delay in resumption of the trial had prejudiced his due process rights. The court denied that motion by order dated July 23, 1984, holding that the issue was rendered moot by the court's approval of the settlement agreement. A settlement decree



incorporating the proposal was issued on November 27, 1984. The plaintiffs appeal from both the decree and the order denying the motion for a new trial, and we affirm.

This action was brought under partnership Law § 115-a, and thus could not be compromised or settled without the court's approval (Partnership Law § 115-a[4]). The plaintiffs contend that the court exceeded its authority in considering for its approval a proposal which was not actually the result of negotiations between the parties, but was an offer by the defendants. While the "power to approve a settlement does not translate into a power to dictate the terms of settlement (Lee v Gucker, 27 AD2d 722; Smith v Ford Motor Co., 38 AD2d 852)" (Sutherland v City of New York, 107 AD2d 568, 569, affd 66 NY2d 800), where it is apparent that no



meaningful settlement negotiations are being conducted, due in large part to the representative plaintiff's unwillingness to make certain concessions, and the court receives a settlement proposal it considers to be adequate, the court is not without authority to present the offer to the class of people being represented for their approval or disapproval, provided the notice sent to the class is fair and impartial, and does not indicate the court's views on the proposal. If the responses received from the members of that class are sufficiently favorable, the court may then consider the proposal for its approval, and hold a hearing on the fairness, reasonableness and adequacy of the same. In this case, this procedure was followed. Upon receipt of what it evidently considered to be an adequate compromise, the court





transmitted the offer to the partners, i.e., the members of the class being represented by the plaintiffs, for their approval. The court did not consider the offer as an agreement submitted for its approval until after it received favorable responses from a majority of the parties involved. In light of the indications in the record that the plaintiffs had some sort of personal stake in the outcome of the litigation that went beyond the representation of the partnerships, the Surrogate did not err in submitting the defendants' proposal to the partners over the plaintiffs' objection.

A review of the record reveals that the Surrogate was fully aware of the proper standards to be applied in evaluating a settlement, that he applied those standards in approving the settlement, and that he entertained no



improper considerations. As it cannot be said that his decision to approve the settlement was a clear abuse of discretion, that decision will not be overturned on these appeals (see, Officers for Justice v Civil Serv. Commn. of City and County of San Francisco, 688 F2d 615, cert denied sub nom. Byrd v Civil Serv. Commn., 459 US 1217; Cotton v Hinton, 559 F2d 1326; City of Detroit v Grinnell Corp., 495 F2d 448).

Since the Surrogate properly approved the settlement agreement, his denial of the plaintiffs' motion for a new trial on the causes of action which were settled and discontinued by the settlement decree was not improper. However the trial, adjourned sine die in October of 1982, should be resumed with all convenient speed insofar as it relates to the cause of action asserted



by the plaintiff Robert Cohen  
individually.

- In light of the foregoing we  
need not reach the other issues raised  
by the plaintiffs, inter alia, with  
respect to the reviewability of the  
dismissal of the third cause of action.  
We have considered the plaintiff's  
remaining contentions and find them to  
be without merit.

MANGANO, J.P., THOMPSON, NIEHOFF and  
RUBIN, JJ., concur.

May 5, 1986



APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X

Robert Cohen, etc.,	:	Index No.
et al.,	:	148704
	:	
Appellants,	:	<u>ORDER</u>
v.	:	
	:	
Robert J. Reed, et al.,	:	
	:	
Respondents.	:	
	:	

-----X

In the above entitled action, inter alia, to recover damages for diversion of partnership assets, the above named Robert Cohen, etc., et al., plaintiffs, having appealed to this court from (1) an order of the Surrogate's Court, Nassau County, dated July 23, 1984, which denied their motion for a new trial (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall





resume; and the said appeals having been argued by Michael E. Schoeman, Esq., of counsel for appellants, argued by Robert W. Corcoran, Esq., and Michael H. Soroka, Esq., of counsel for respondents Robert Reed, Sidney Hackell, Citibank, Beatrice Potter, William B. F. Werner, Individually and D/B/A Mid-Island Hospital, Dadgab, Inc., Brimco, Inc., Simon Cohen Real Estate Co. and Aljer Realty Co., argued by Murray Koven, Esq., of counsel for Judah Feinerman and Jasdane, Inc., and submitted by Albert J. Fiorella, Esq., of counsel for respondents Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc. Sheldon Katz and Volume Feeding, Inc., due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is



ORDERED that the decree  
appealed from are hereby unanimously  
affirmed, and it is further

ORDERED that one bill of costs  
is hereby awarded to the respondents  
Reed, Hackell, Citibank, Potter, Werner,  
Dadgab, Inc., Brimco, Inc., Simon Cohen  
Real Estate Co., Aljer Realty Co., Soto,  
Wilschek, J.S.K. Cleaning Services,  
Inc., Katz and Volume Feeding, Inc.,  
appearing separately and filing separate  
briefs, and it is further

ORDERED that the Surrogate is  
hereby directed to resume the trial on  
the seventeen cause of action with all  
convenient speed.

E N T E R

/s/  
Acting Clerk of the  
Appellate Division

[ENTERED May 5, 1986.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- :  
ually and as a Partner :  
of SIMON COHEN REAL :  
ESTATE & MANAGEMENT :  
CO., SIMON COHEN :  
REALTY CO., SIMON :  
COHEN COMPANY and :  
ALJER REALTY CO. suing :  
on behalf of himself :  
and all other partners, :  
both general and : File No. 148704  
limited, and in the :  
right and on behalf of : Dec. No. 430  
SIMON COHEN REAL ESTATE :  
SIMON COHEN COMPANY :  
and ALJER REALTY CO.,

: DECISION

Plaintiffs- :  
Appellants, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER and the FIRST :  
NATIONAL CITY BANK, :  
individually and as :  
Executors of the Last :  
Will and Testament of :  
SIMON COHEN, deceased, :  
WILLIAM B.F. WERNER, :  
individually and doing :  
business as MID-ISLAND :  
HOSPITAL, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :



INC., DADGAB INC.,  
 BRIMSCO, INC., SIMON :  
 COHEN REAL ESTATE &  
 MANAGEMENT CO., SIMON :  
 COHEN REALTY CO. and  
 ALJER REALTY CO. :

Defendants- :  
 Respondents. :

-----X

In this proceeding which concerned various partnerships in which the decedent had an interest, the Appellate Division has affirmed this Court's decree dated November 27, 1984. The decree approved a stipulation of settlement as to every cause of action which remained following the granting of partial summary judgment (decision dated November 28, 1979) with the exception of the seventeenth cause of action in the amended complaint which was brought by Robert Cohen individually. The Appellate Division has directed in its decision (NYLJ, May 9, 1986, p 15, col 1) that this





matter proceed with all convenient speed. Accordingly, the attorneys for all of the parties are directed to appear on Wednesday, May 14, 1986, at 9:30 a.m., for the purpose of scheduling the continuance of the trial of the seventeenth cause of action. The attorneys should be prepared to discuss at the conference the estimated time which will be required for the trial of the remaining cause of action so that the court can schedule the same on its calendar. The attorneys should be prepared to continue the trial on a date in May or June and no later.



A400

This decision constitutes an order of the court. No further order need be submitted.

Dated: May 9, 1986

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



STATE OF NEW YORK,  
COURT OF APPEALS

-----X

Robert Cohen, Individ- : ORDER  
ually &c., et al.,

Appellants, : Mo. No. 723

vs. :

Robert J. Reed, et al., :

Respondents. :

-----X

A motion for leave to appeal  
to the Court of Appeals in the above  
cause having heretofore been made upon  
the part of the appellants herein and  
papers having been submitted thereon and  
due deliberation having been thereupon  
had, it is

ORDERED, that the said motion  
be and the same hereby is dismissed upon  
the ground that the order sought to be  
appealed from does not finally determine



A402

the action within the meaning of the  
Constitution.

/s/  
Donald M. Sheraw  
Clerk of the Court

[ENTERED September 16, 1986.]





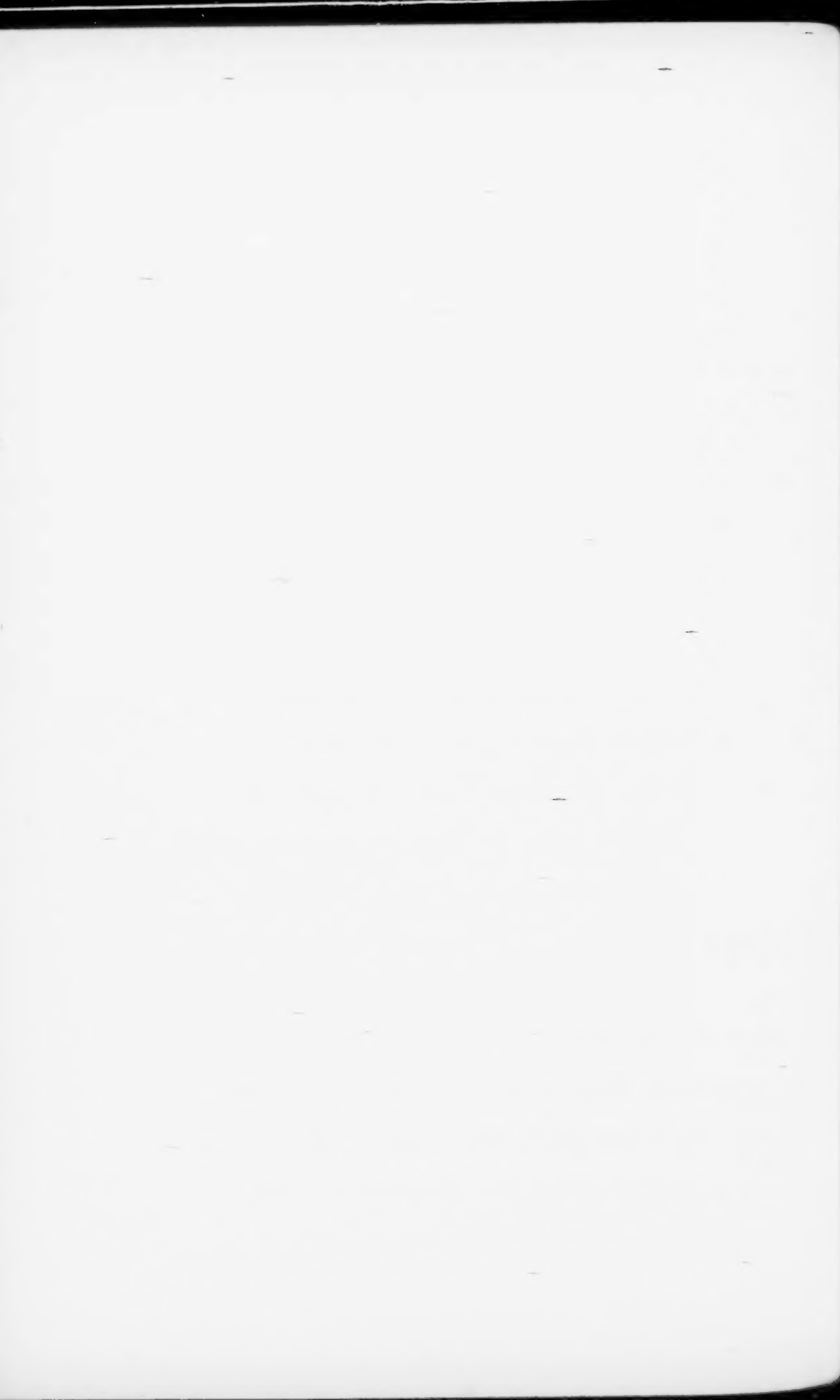
STATE OF NEW YORK  
COURT OF APPEALS

-----X

Robert Cohen, &c., et	<u>ORDER</u>
al.,	:
Appellants,	2-10
	: <u>Mo. No. 414</u>
vs.	:
	:
Robert J. Reed, et al.,	:
Respondents,	:
	:
-----X	

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.



A404

/s/ Donald M. Sheraw  
Donald M. Sheraw  
Clerk of the Court

[ENTERED June 4, 1987.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Nassau County  
ually and as a partner  
of Simon Cohen Real : Index No.  
Estate and Management 148704/71  
Co., Simon Cohen Realty:  
Co., suing on behalf of ORDER OF  
himself and all other : DISMISSAL  
partners, both general WITH PREJUDICE  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

Upon the consent of plaintiff  
Robert Cohen and defendant Robert Reed,  
by their respective attorneys,  
constituting all parties interested in  
the seventeenth cause of action herein,  
it is hereby

ORDERED, that all prior  
stipulations of discontinuance as to the  
seventeenth cause of action are hereby  
vacated; and it is further





ORDERED that the seventeenth  
cause of action herein is dismissed with  
prejudice and without costs.

Dated:

/s/ C. Raymond Radigan  
Judge of the Surrogate Court

The undersigned attorneys of  
record for plaintiff Robert Cohen and  
defendant Robert Reed, respectively,  
hereby consent to entry of the above  
order.

Dated: September 16, 1987

SCHOEMAN, MARSH, UPDIKE & WELT

By: /s/

Attorneys for plaintiff  
Robert Cohen  
60 East 42nd Street  
New York, New York 10165

SPENO, GOLDBERG, MOORE,  
MARGULES & CORCORAN

By: /s/

Attorneys for defendant  
Robert Reed  
1565 Franklin Avenue  
Mineola, New York 11501



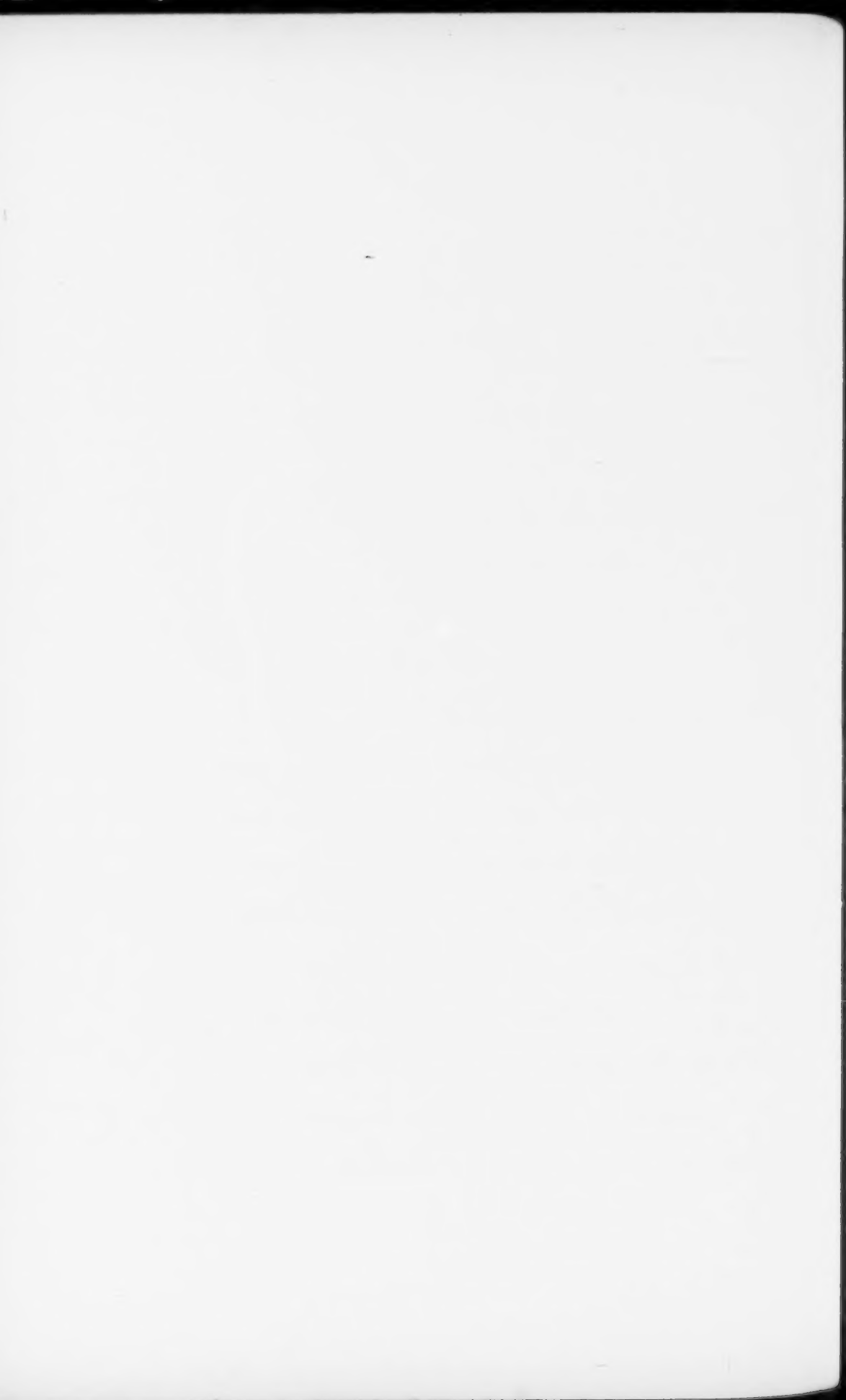
STATE OF NEW YORK,  
COURT OF APPEALS

-----X

Robert Cohen, Individ-	:	<u>ORDER</u>
ually &c., et al.,	:	
	:	
Appellants,	:	Mo. No. 1211
	:	
vs.	:	
	:	
Robert J. Reed, et al.,	:	
	:	
Respondents.	:	
	:	
-----X		

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine



the proceeding within the meaning of the Constitution because further determinations by the Surrogate are required.

/s/  
Donald M. Sheraw  
Clerk of the Court

[ENTERED December 17, 1987.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File No.  
ually and as a Partner : 148704  
of Simon Cohen Real :  
Estate Co., etc., :

Plaintiff, : Dec. No.

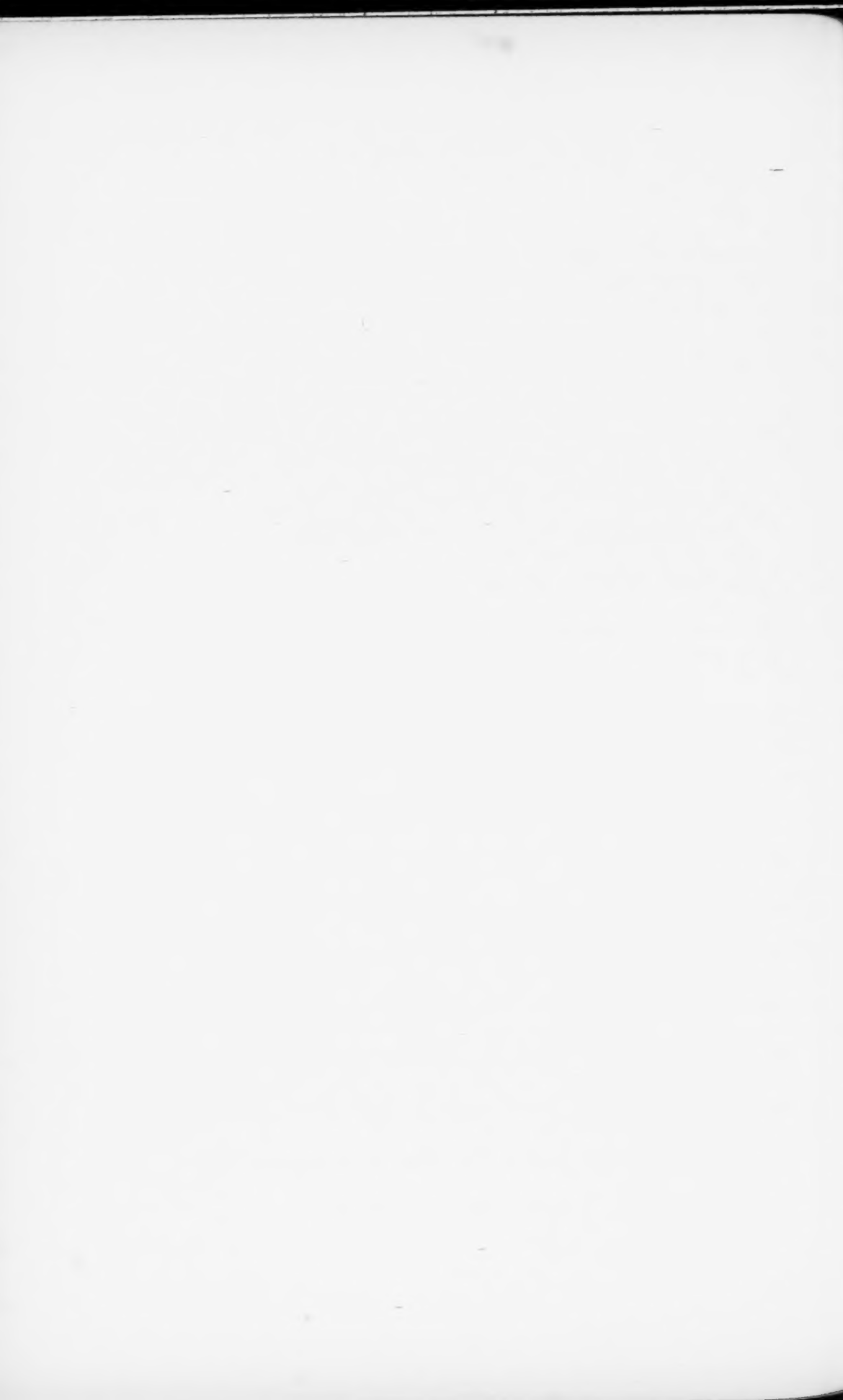
- against - : NOTICE OF  
HEARING

ROBERT J. REED, et al., :  
Defendants. :

-----X

NOTICE OF HEARING

This proceeding which was commenced by Robert Cohen, individually and on behalf of certain partnerships, was transferred from the Supreme Court, Nassau County, to the Surrogate's Court, Nassau County. By decision dated April 27, 1984, the court approved a proposed settlement of the action except for imposing condition 1E of the





proposed settlement. The decision was followed by a decree and the decree was affirmed by the Appellate Division, Second Department. An appeal was filed with the Court of Appeals. No determination has been made as to whether this appeal will be heard. This decision will not be made by the Court of Appeals until a final determination has been made by this court as to the allocation of the settlement proceeds.

The first issue presently before the court is the reimbursement of attorneys' fees and costs incurred by Robert Cohen in his representative capacity and/or payment directly to the attorneys for legal services provided to the partnerships. The question to be decided is what, if any, attorneys' fees and costs should be allowed from the



settlement proceeds, thus reducing the amounts to be distributed to the partnerships.

The second issue to be decided is the division of \$500,000 in settlement proceeds between Simon Cohen Real Estate and Management Company and Simon Cohen Realty Company.

A hearing will commence on May 31, 1988, at 9:30 a.m., in connection with the above at the Nassau County Surrogate's Court, 262 Old County Road, Mineola, New York. Anyone who wishes to be heard on this matter must appear in person or by counsel at that time. Following the hearing, the matter will be submitted for decision to



A413

the court and a copy of the decision  
will be mailed to each of the partners.

Dated: April 28, 1988.

/s/  
PEYTON BOSWELL  
Chief Clerk-Referee  
Nassau County  
Surrogate's Court



STATE OF NEW YORK  
COURT OF APPEALS

-----X

Robert Cohen, Individ- : ORDER  
ually &c., et al.,

Mo. No. 62

Appellants,

vs.

Robert J. Reed, et al.,

Respondents.

-----X

A motion for reargument of  
motion for leave to appeal &c. to the  
Court of Appeals in the above cause  
having been heretofore made upon the  
part of the appellants herein and papers  
having been submitted thereon and due  
deliberation thereupon had, it is





A415

ORDERED, that the said motion  
be and the same hereby is withdrawn.

/s/

Donald M. Sheraw  
Clerk of the Court

[ENTERED May 26, 1988.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	<u>DECISION</u>
ually and as a Partner	:	
of Simon Cohen Real	:	File No.
Estate Co., etc.,	:	148704/71
	:	Dec. No. 996

Plaintiff,

- against -

ROBERT J. REED, et al.,  
Defendants.

-----X

-This is a hearing to determine attorneys' fees in a derivative partnership action.

The representative plaintiff seeks reimbursement from the settlement fund for fees paid by him to the attorney representing the "class" and challenges the fees on the grounds that these charges were excessive. Attorneys' fees, in addition to those already paid, are sought from the settlement fund.



At the hearing the representative plaintiff requested disclosure of one attorney's income tax returns to support his contention that there was excessive billing. This application was opposed. Tax returns are discoverable only where the information sought is unavailable from other sources (Matthews v Industrial Piping Co v Mobil Oil Corp, 114 AD2d 772; Briton v Knott Hotels Corp, 111 AD2d 62; Mamunes v Szczepanski, 70 AD2d 684; Di Bassi v Gosenhauser, 36 Misc 2d 799). Accordingly, the court directed the attorney to submit his time records for the period 1970 to 1982 for in camera review.

A review of the time records does not disclose evidence of excessive or "double" billing. The records indicate an approximate average of 7.95 billing hours per day over a twelve year



period. This approximation was arrived at by a random sampling of three months a year for each of the twelve years. Figures were averaged for the year and then for the total of the twelve year period. The hours indicated do not exceed the usual number expended by an attorney and do not indicate excessive billing, which would merit further review or disclosure of the records after redaction of clients' names.

Income tax returns are not discoverable absent a showing of necessity (Matthews v Industrial Piping Co, supra) based on the public policy of encouraging the filing of accurate returns (Production or Privilege; Income Tax Returns and the Federal Rules, 1982 Tr Law Guide 1). Production of income tax returns has been denied where the information sought was not necessary to develop material facts in support of the





party's position (Smith v Providence Washington Insurance Co, 51 AD2d 1074; Conway v Hewitt 7 AD2d 931; Turnpike Delicatessen and Restaurant, 34 Misc 2d 183).

Here, the representative plaintiff seeks the returns in order to establish his allegation of excessive billing. The plaintiff contends that disclosure of the attorney's returns will indicate income from other clients which could not have been generated unless there had been double billing. There are no schedules in an income tax return indicative of the billing of individual clients (See Terzo v Manufacturers Hanover Trust Co, 68 AD2d 865). Additionally, even if the tax returns indicated an amount substantially in excess of the total amount billed to the plaintiff the returns would not reflect the number of



hours expended to produce the additional income. Thus, the tax returns cannot be used to develop material facts in support of the plaintiff's contention.

It is true that the attorney has injected his income as an issue in this case because of his position that lost income from other sources should be taken into account when the court determines a reasonable fee. That is, the attorney contends that he was unable to work on other cases because of the time spent on the instant litigation. This is one criterion for determining attorneys' fees in a "class" action. The critical facts relevant to this issue are the number of hours expended on this litigation compared to the total number of hours worked. These facts will indicate the amount of time which could not be devoted to other cases.



A421

For the foregoing reasons, the application for an order directing disclosure of income tax returns is denied. The records will be returned to the attorney.

This decision constitutes an order of the court.

Dated: August 19, 1988

/s/ C. Raymond Radigan  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	File No.
ually and as a Partner	:	148704
of Simon Cohen Real	:	
Estate and Management	:	Dec. No. 1092
Company,	:	
	:	<u>DECISION</u>
Plaintiff,	:	
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

In this derivative action, the remaining questions to be resolved are the amount of counsel fees to be allowed from the settlement fund pursuant to Section 115-a subdivision [5] of the Partnership Law and the allocation of the balance of the fund among the partners.

The representative plaintiff, Robert Cohen, commenced this action on behalf of the partners Simon Cohen Real Estate and Management Company, Simon





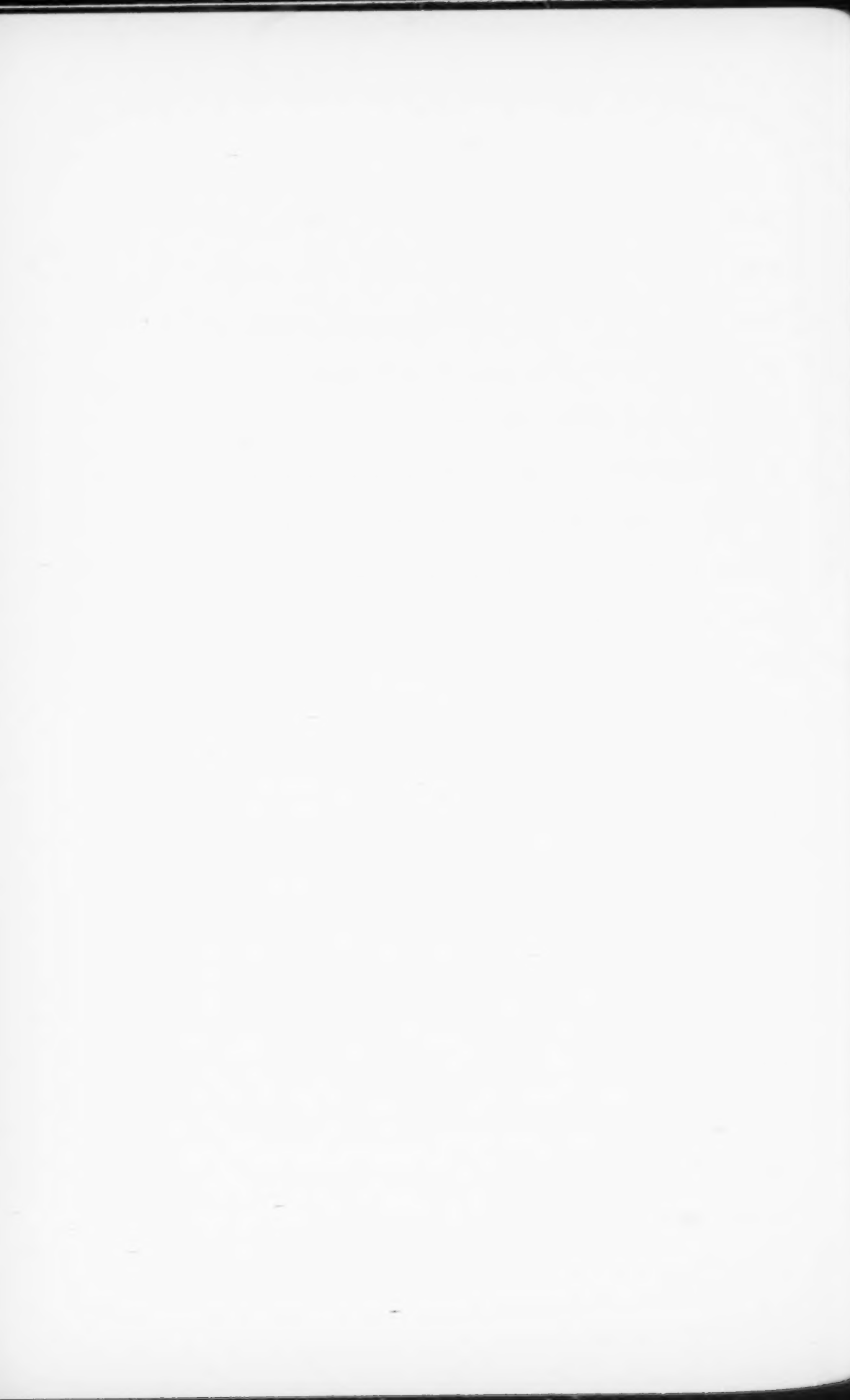
Cohen Realty Company, Simon Cohen Company and Alger Realty Company, alleging fraud, mismanagement and waste of partnership assets. The executors of the estate of Simon Cohen are among the defendants. The complaint is comprised of seventeen causes of action, sixteen of which were commenced by Robert Cohen as a general and limited partner of the partnerships. The seventeenth cause of action is brought by Robert Cohen, individually.

The action was commenced in the Supreme Court, Nassau County and transferred to the Surrogate's Court. By order dated January 11, 1980, the defendants' motion for summary was granted in part, dismissing the first and third causes of action.

The trial of this action began in 1980. During the period of time that the trial was in progress,



settlement negotiations took place with the assistance of the court. In 1982, the plaintiffs submitted a proposed settlement to the court and the defendants submitted a counter-proposal. A difference of opinion arose between Robert Cohen and his counsel, Stephen Hochhauser, as to the advisability of accepting the settlement offer made by the defendants. According to Cohen, Hochhauser refused to continue representation of the plaintiffs in this matter unless Cohen agreed to accept the proposed settlement. Cohen moved for an order permitting the substitution of Hochhauser, and Hochhauser cross-moved for advice and direction, contending that Cohen had a personal animosity towards one of the defendants, Robert Reed, which prevented Cohen from exercising independent judgment regarding the settlement. Hochhauser



contended that Cohen should be removed as the representative plaintiff.

In a decision dated August 2, 1982, the court determined that it was appropriate for counsel for the "class" to seek advice and direction if he believed that their interests were jeopardized. The court directed the plaintiff to mail a copy of the August 2, 1982 decision and a "Notice of Hearing" to the partners. This Notice apprised the partners of (1) the status of settlement negotiations, (2) Hochhauser's allegations concerning Cohen's conduct, (3) the motion for an order substituting counsel and (4) the date of the scheduled hearing on items (2) and (3). A hearing was subsequently held, and the motion for an order substituting counsel for the "class" was granted in a subsequent decision. The decision noted that Cohen had a right to



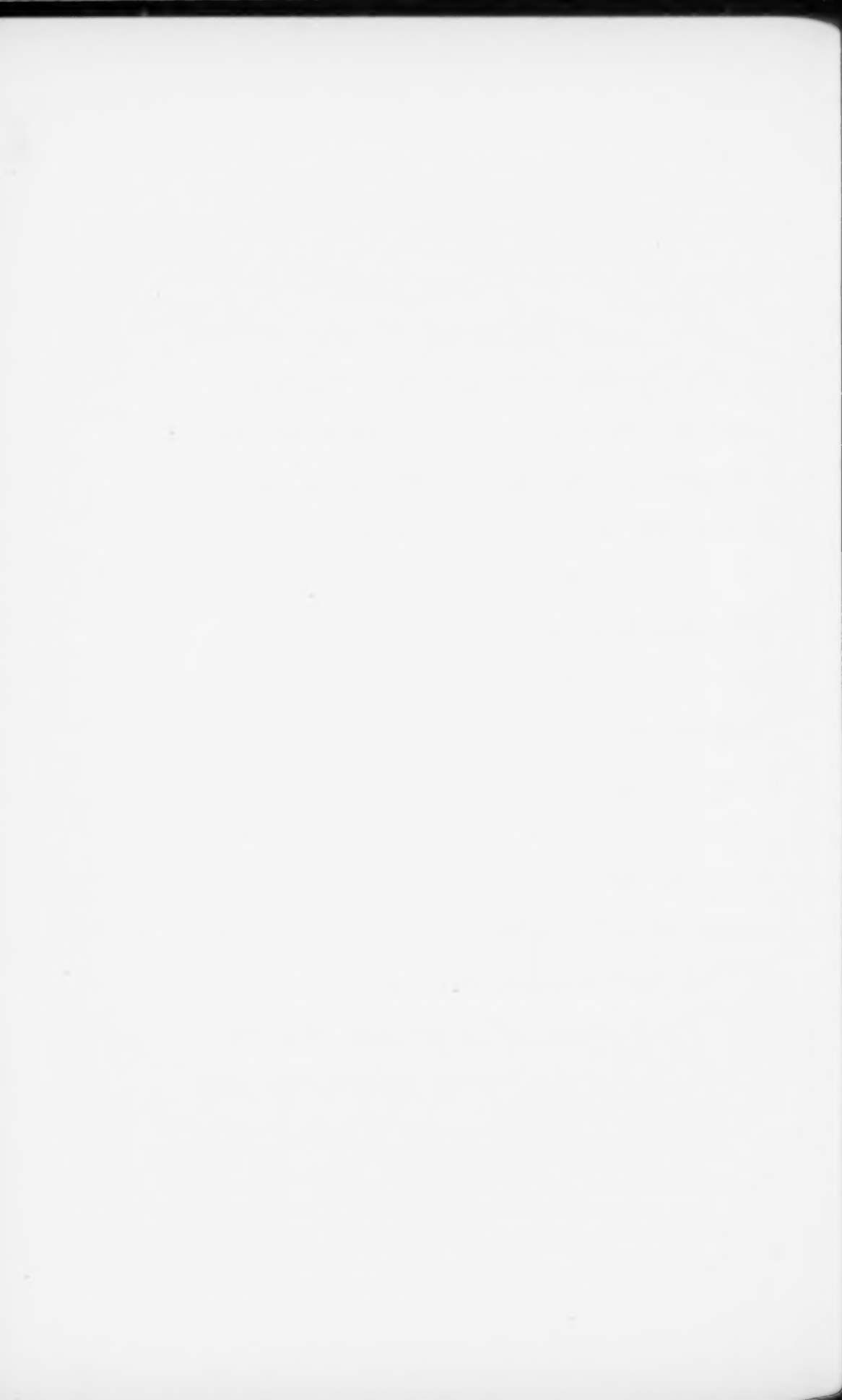
substitute his counsel on the seventeenth cause of action, without court approval and granted the substitution as to representation of the "class". The court further found that although Robert Cohen apparently disliked Robert Reed, the proof was insufficient to require disqualification (NYLJ 1/26/83, p. 15 col. 1). It was further noted that the amount chargeable to the partnerships for services rendered by Hochhauser would depend upon the recovery in the action and the question of attorneys' fees for services rendered on behalf of the partners and to Robert Cohen, individually, would be deferred until a decision on the merits or the approval of a settlement agreement.

In the decision dated January 13, 1983, the Court determined that the partners should be apprised of





the defendants' latest settlement proposal. A "Notice of Settlement Offer", "Description of Litigation" and a copy of the proposal were forwarded to each of the partners, who were invited to communicate their acceptance or rejection of the offer on or before February 16, 1983. The court reviewed the responses (NYLJ 4/19/83 p. 14 col. 6), which overwhelmingly favored acceptance of the proposal. Some of the partners indicated that the settlement proposal would be acceptable to them if three conditions were incorporated. The court determined that for the next stage of the proceedings these conditions would be deemed incorporated into the settlement proposal and at a later date the defendants would have an opportunity to reject the proposal. A hearing was then held to permit the representative plaintiff or any partner to offer proof



as to why the proposed settlement should not be approved. None of the partners appeared at the hearing except Robert Cohen. In a decision dated April 27, 1984 the court approved the proposed settlement with the inclusion of the three conditions, over the objection of Robert Cohen, finding that a representative plaintiff had a duty not only to vigorously prosecute an action but to accept a settlement which is in the best interest of the "class" (Norman v Arcs Equities Corp, 72 F.R.D. 502) and upon refusal of the representative plaintiff to accept such a settlement, the court could approve it without his consent (Flinn v FMC Corp, 528 F2d 1169 cer den, 424 US 967). At the time of the approval, 55 days had been expended on the trial and the transcript in this action already totalled 5,500 pages. The court was satisfied from the record



that the settlement proposal, which provided for a payment of \$500,000 as well as nonmonetary benefits, was in the partners best interests. On appeal by Robert Cohen from the order entered on the decision of April 27, 1984, the Appellate Division affirmed (120 AD2d 480). Applications for leave to appeal to The Court of Appeals were dismissed, the last decision stating that this court's order was not a final order (68 NY2d 807; 69 NY2d 1038; 70 NY2d 899).

In order to finalize this matter, the Court forwarded to the partners a "Notice of Hearing" on the question of attorneys' fees and allocation of the settlement fund and a hearing was thereafter held.

The Court is now required to determine the amount of fees allowable from the settlement fund. The only attorney who has submitted a petition



and sought the fixation of his fee is Stephen Hochhauser.

A further issue to be addressed is the amount of the fees to be paid by Robert Cohen, individually, on the seventeenth cause of action. Although Cohen argues that the Court lacks jurisdiction over this issue, the Court is satisfied that it has jurisdiction to determine the fees to which Hochhauser is entitled for representing Cohen individually in an action tried in this court, in which the executors of an estate were parties (Matter of Piccone, 57 NY2d 278).

In 1972, Hochhauser and Robert Cohen, individually entered into a retainer agreement which provided for payment at an hourly rate and if this proved to be "inadequate" based on the recovery, a bonus to be paid on the basis of results achieved. A subsequent





agreement dated September 28, 1979 provided for a prospective increase in the hourly rate. Pursuant to these agreements, Cohen paid Hochhauser a total of \$311,245 in fees.

Cohen alleges that Hochhauser refused to proceed unless Cohen agreed to the proposed settlement and that this amounted to an unjustified withdrawal from the case. In the alternative, Cohen alleges that Hochhauser was discharged for cause. Under either theory, Cohen contends that Hochhauser should forfeit compensation. Hochhauser alleges that the principal reason for the disagreement between himself and Cohen was not acceptance of the settlement proposal but problems which arose because Cohen attempted to dictate trial strategy and further had not paid outstanding bills. Hochhauser contends that he was discharged without cause and



he is entitled to compensation on a quantum meruit basis.

Neither Hochhauser's support of the proposed settlement nor his application for advice and direction constituted an abandonment or withdrawal from the case. As the court noted in its decision of August 2, 1982 counsel for the "class" has a special fiduciary relationship with them (Pettway v American Cast Iron Pipe Co., 576 F2d 1157, cert den 439 US 1115) and a duty to protect the interests of the class where counsel feels those interests are jeopardized by the representative plaintiff. The Appellate Division affirmed this court's decision that Cohen had failed to act in the best interests of the "class" by refusing to consent to the stipulation (Cohen v Reed, 120 AD2d 480) nor does the court believe that Hochhauser was motivated by



bad faith. Further, the record does not support a conclusion that Hochhauser was discharged for cause. The court finds Cohen's allegations concerning the quality of Hochhauser's services to be without merit.

The total fee now requested by Hochhauser for the period 1972 through 1981 is now \$555,398.75, based on an increased valuation of the hourly billing rate, plus \$10,062.00 for experts' fees and \$875.00 for transcripts. Additionally, Hochhauser seeks interest for 79 months on the difference between \$311,245 already paid and the amount he seeks on a quantum meruit basis. Alternatively, Hochhauser contends that if the court views his services as having been completed by the presentation to Cohen of the offer of settlement, the retainer agreement is



binding as to the hourly rate and as to the bonus provision (SM 191).

Whether or not it was the intention of the parties that the retainer agreement between Hochhauser and Cohen would bind the members of the "class", the retainer agreement was never binding on them. The sum recoverable as attorneys' fees from the settlement fund is not measured by the amount which the representative plaintiff has expended or contracted (1 Speiser, Attorney's Fees, sec 11:34 [1973]). The determination of fees is solely within the discretion of the court. Parenthetically, the defendants lack standing to question the payment of attorneys' fees from the fund.

Although the general rule in American procedure is not to permit the prevailing party recovery of attorneys' fees, an exception is carved out for





derivative and class actions to prevent unjust enrichment to those who benefit from the creation of a "common fund." New York's statutes and case law follow the federal statutes and decisions (Sternberg v Citicorp Credit Services, Inc., 110 Misc2d 804; Washington Federal Savings and Loan Association v Village Mall, 90 Misc2d 227; CPLR 909). Section 115-a subdivision (5) of the Partnership Law specifically provides for allocation of part of the recovery to attorneys' fees. The fact that this matter was settled prior to conclusion of the trial does not affect counsel's right to compensation.

Both Cohen and Hochhauser argue that the entire monetary recovery should be allocated to legal fees and that this was the understanding of the parties during settlement negotiations. The stipulation of settlement, however,



does not so provide. Further, it was not the Court's understanding during the settlement negotiations that the entire settlement fund was automatically to be applied to attorneys' fees. As previously stated, the amount of attorneys' fees was to be determined by the court. The allegation that the funds were to be applied solely to attorneys' fees is specifically refuted by defendants' counsel.

The first step in the determination of attorneys' fees is an assessment of the reasonable hourly rate which is then multiplied by the number of hours expended for the benefit of the "class" to create a base figure (Lindy Brothers Builders, Inc. of Philadelphia v America Radiator and Standard Sanitary Corp., 540 F2d 102 and 487 F2d 161). Decisions in this area consistently recognize the difficulty in arriving at



an hourly rate for professional services. the starting point is counsel's usual billing rate, as to which Hochhauser testified. However, this may be adjusted upwards or downwards depending on the circumstances of each case. In the instant case Hochhauser did not submit any evidence as to the "prevailing" rate for the type of services rendered for each of the years in question. However, it would appear that the hourly rates agreed to in the retainer agreement are consistent with hourly rates assigned by courts in similar litigation. Although the hourly rate applicable when work was done may be adjusted upwards to compensate an attorney for deferrals in payment (*Weiss v York Hospital*, 628 F Supp 1392), here Hochhauser received payment on a regular basis.



The record fails to distinguish the number of hours expended on the first sixteen causes of action and the seventeenth cause of action. For the purpose of the initial computations, the court will assume that all of the time expended was in connection with the first sixteen causes of action.

Cohen disputes Hochhauser's allegation that a total of 4,299.50 hours were expended up until 1982. Cohen sought disclosure of copies of Hochhauser's tax returns in connection with his allegations that Hochhauser had billed Cohen for time which was spent on other clients. Noting that Cohen had previously sought records of Hochhauser's firm, the court directed Hochhauser to submit his diaries for in camera review, and the Court took a random sample of three months per year





for each of the twelve years of diaries submitted. Figures were averaged for the year and then for the total of the twelve year period. Since the hours indicated did not exceed the usual number expended by an attorney and did not indicate excessive billing (NYLJ 8/25/88, p.22 col.3), disclosure of the diaries was denied. Disclosure of the tax returns was denied on the grounds that they should only be subject to disclosure where necessary and also that they would not indicate the amount of income generated by each client.

The Court is satisfied that the number of hours alleged were expended. Cohen admits that he received monthly bills. Hochhauser testified that Cohen received the bills in detail when they were presented and that Cohen questioned Hochhauser when he believed an error had been made. The evidence

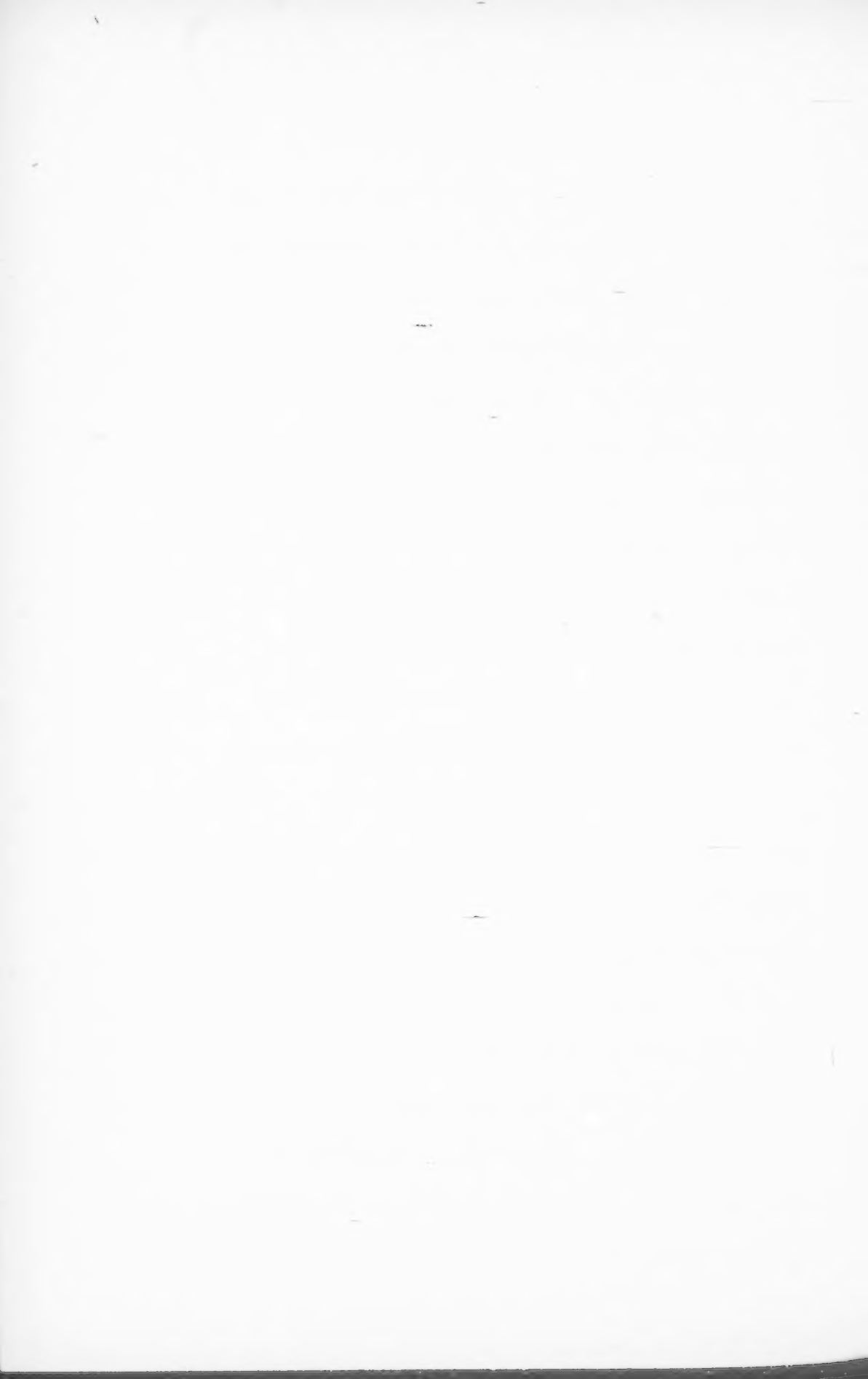


supports the conclusion that the bills were carefully scrutinized. Hochhauser alleges that there remains 133.25 hours in uncompensated services for 1982.

These services are not broken down into office time and court time nor are the services rendered on the seventeenth cause of action distinguished. For the purpose of the initial computation, these additional services, which are limited in amount in relation to the overall hours, will be disregarded.

Accordingly, the Court finds that for the purpose of the initial computation of legal fees \$311,245 is the base figure.

The next stage is to evaluate this figure within the context of the total amount of the recovery. While the court seeks to compensate counsel for the work performed, it must also protect the interests of the beneficiaries of



the fund whose redress is the reason for the creation of the fund (In re Chicken Antitrust Litigation, 560 F Supp 963).

The total amount of the monetary recovery in this case was \$500,000 (plus interest). The usual amount of attorneys' fees allowed in this type of action is between 20% and 30% of the fund with 50% regarded as the uppermost limit (Newberg, Attorney Fee Awards, sec 2.08, [1986]).

A factor to be considered in determining the award is any nonmonetary benefit to the beneficiaries (Mills v Electric Auto-Lite Co., 396 US 375). A second factor to be considered is the burden placed on small firm by massive litigation (Municipal authority of Town of Bloomsburg v Commonwealth of Pennsylvania, 527 F Supp 982). The court must also take into account the



substantial skill and experience of counsel.

A further factor to be considered is the novelty and complexity of the issues raised. Here, the questions of law were not novel although the factual issues were complex and required extensive discovery.

However, these additional factors are not sufficient to justify an award from the settlement funds which is even close to the amount requested. Hochhauser vigorously urged approval of the settlement of \$500,000, which was ultimately approved on the grounds that it was in the best interests of the partners. He now seeks the total amount of the recovery for the payment of his fees. Hochhauser contends that the contingency factor that is, the fact that no recovery might have been obtained from which legal fees could be





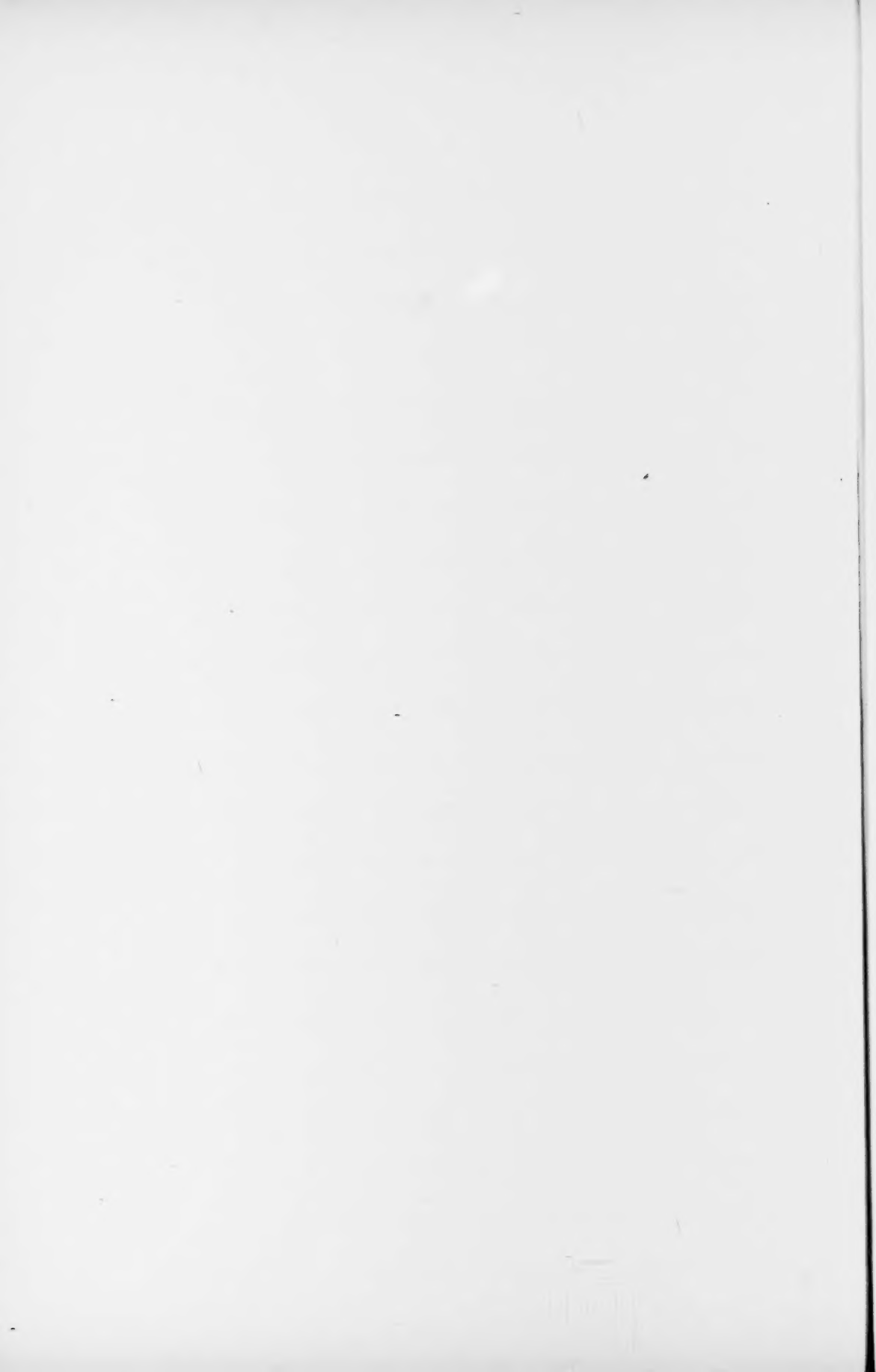
paid, should be considered. However, the contingency factor can be a two-edged sword (See Kane v Martin Paint Stores, Inc., 439 F Supp 1054). While in some cases it results in an increase in the fee when the chance of success was uncertain, at the same time in the context of determining the fee to be allowed in a derivative action, a case in which only a limited recovery can reasonably be anticipated might not justify the expenditure of enormous amounts of time. In the decision approving the settlement proposal, the court noted the difficulties of proof encountered by the plaintiffs as well as the obstacles imposed by the statute of limitations. Additionally, Cohen and Hochhauser had a retainer agreement which assured Hochhauser of payment.

Accordingly, the court finds that a reasonable attorney's fee for



services rendered to the beneficiaries of the fund is \$175,000 plus \$10,062.00 for experts fees and \$875.00 for transcripts.

Accordingly, \$11,937.00 is to be paid from the settlement fund directly to Hochhauser for the payment of experts fees and transcripts. Robert Cohen is to be paid \$175,000 from the settlement fund to reimburse him to the extent of the reasonable fees fixed. Robert Cohen is also entitled to reimbursement for proper disbursements. Mr. Hochhauser should submit an itemization of those disbursements reimbursed or paid by Robert Cohen prior to Hochhauser's discharge. The balance of the fees for which Mr. Cohen contracted with Mr. Hochhauser are the responsibility of Mr. Cohen, individually, as he contracted personally for these services (Bakery



and Confectionary Workers International Union of America v Ratner, 335 F2d 691).

All fees payable to Hochhauser for his representation of the "class" whether they are to be reimbursed to Cohen from the settlement fund or not, have been paid.

As to the services rendered in connection with the seventeenth cause of action, it is not necessary to determine what percentage of the prior amounts already paid represent payment on the first sixteen causes of action as distinguished from the seventeenth cause of action. Cohen is liable for the services rendered on all causes of action based on his contract with Hochhauser. Whether a client is entitled to a review of the value of the services already compensated where the attorney is discharged without cause depends on the intentions of the parties



and the surrounding circumstances, such as misconduct on the part of the attorney (Leibowitz v Szoverffy, 97 Misc2d 854). The court finds no circumstances warranting a review of the sums previously paid. In any event, the fees paid to Hochhauser at the hourly rate provided by the retainer agreement are found to be fair and reasonable.

As to uncompensated services in 1982 the record fails to distinguish between services rendered to the "class" and those rendered in connection with the seventeenth cause of action. The Court has already determined the compensation for services rendered to the "class." The question remaining is the quantum meruit value of the services rendered in connection with the seventeenth cause of action (Brill v Kad, 61 AD2d 1000). Since the seventeenth cause of action was not part





of the settlement agreement, it continued on after Hochhauser's discharge requiring the application of quantum meruit rather than the retainer. As the retainer agreement is not enforceable, the bonus provision is inapplicable.

The court will afford Mr. Hochhauser an opportunity to establish services rendered in connection with the seventeenth cause of action in 1982, if he is so advised provided he requests a hearing by January 11, 1989.

On the question of the allocation of the settlement fund the record is insufficient to make a determination with respect to the division of the balance of the recovery remaining after the payment of legal fees. Accordingly, a hearing must be held on this question. Counsel for the

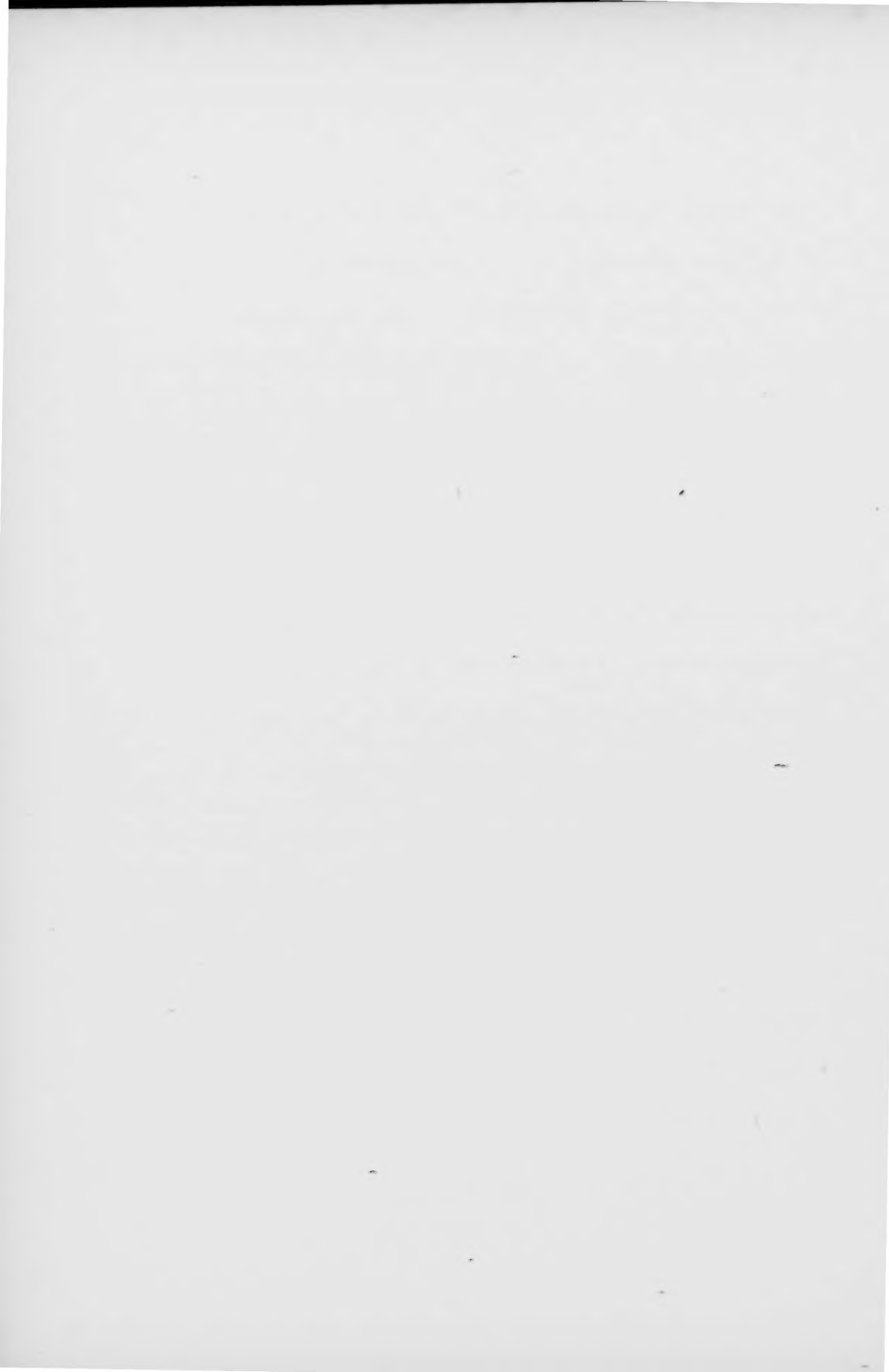


representative plaintiff should prepare a Notice of Hearing to be forwarded to the individual partners. The proposed Notice of Hearing should be sent to the court and if found to be in proper form will be forwarded to the partners. The expense of copying and mailing the Notice will be deducted from the settlement fund. The hearing on this question will take place on February 27, 1989, and the representative plaintiff is requested to forward the proposed Notice to the Court within two weeks of the date of this decision.

Settle order.

Dated: December 30, 1988

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File No. 148704  
ually and as a partner  
of Simon Cohen Real :  
Estate and Management  
Co., Simon Cohen Realty: NOTICE OF  
Co., suing on behalf of HEARING  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

NOTICE OF HEARING

TO THE PARTNERS OF SIMON COHEN REALTY  
COMPANY AND SIMON COHEN REAL ESTATE AND  
MANAGEMENT COMPANY AND SIMON COHEN  
COMPANY:

On November 27, 1984, this  
Court, by Decree, approved a settlement  
of this action.

There is presently available  
for allocation to Simon Cohen Realty  
Company and Simon Cohen Realty Estate &  
Management Company the sum of \$500,000.

The Court has determined by  
decision dated December 30, 1988, that  
from the settlement fund the  
representative Plaintiff, Robert Cohen,  
is to be reimbursed the sum of \$175,000  
for attorney's fees previously paid by  
him, as well as an additional amount for





disbursements still to be determined. The Court has also directed that out of the said fund there be paid to Stephen Hochhauser, Esq. the sum of \$10,062 as reimbursement for expert witness fees advanced by him.

The Court will hold a hearing, at which any of the partners may be heard, at 10:00 a.m. on the 27th day of February, 1989 at the Courthouse, 262 Old Country Road, Mineola, New York, for the purpose of determining the allocation of the balance of the \$500,000 fund between Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company.

A further issue has been raised concerning the payment of interest on the settlement funds. The decision approving the settlement does not provide for interest. However, Robert Cohen advances the argument that



interest should be paid. Any partner will be heard on this question, as well, at the hearing.

Dated: February 6, 1989

/s/  
VINCENT P. MALLAMO  
Acting Chief Clerk of  
the Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : DECISION  
ually and as a Partner  
of Simon Cohen Real : File No. 148704  
Estate and Management  
Company, : Dec. No. 339

Plaintiffs, :

-against- :

ROBERT J. REED, et al.,:

Defendants. :

-----X

The remaining question to be resolved in this derivative action is the allocation of the balance of a \$500,000 settlement fund (See Notice of Hearing dated February 6, 1989). The balance shall be divided equally between the Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company.



Settle decree on five days'  
notice with five additional days if  
service is made by mail.

Dated: April 13, 1989

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Index No.  
ually and as a partner : 148704  
of Simon Cohen Real :  
Estate and Management  
Co., Simon Cohen Realty: SUPPLEMENTAL  
Co., suing on behalf of DECREE  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

The Court, by decree entered November 27, 1984, having ordered that a settlement fund of \$500,000 be paid to Simon Cohen Realty Company and to Simon Cohen Real Estate Management Company, and having further ordered that a hearing should be held to determine what portion thereof, if any, should be allocated to the Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company, and the Court having notified all parties and the partners of said partnerships of a hearing thereon by notice of hearing dated February 6, 1989, and the Court having held such hearing, on February 27, 1989, and the Court having



rendered its decision dated April 13,  
1989,

NOW, THEREFORE, upon motion of  
Schoeman, Marsh, Updike & Welt,  
attorneys for plaintiff Robert Cohen, it  
is hereby

ORDERED, ADJUDGED and DECREED  
that the settlement fund of \$500,000  
herein be divided equally between Simon  
Cohen Realty Company and Simon Cohen  
Real Estate and Management Company.

Dated: May 9, 1989

/s/ C. Raymond Radigan  
SURROGATE



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : Index No.  
ually and as a partner 148704  
of Simon Cohen Real :  
Estate and Management  
Co., Simon Cohen Realty: ORDER  
Co., suing on behalf of  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :





COHEN REAL ESTATE &  
 MANAGEMENT CO., SIMON :  
 COHEN REALTY CO., and  
 ALJER CO., :

Defendants. :

-----X

The Court, by decree entered November 27, 1984, having ordered that a settlement fund of \$500,000 be paid to Simon Cohen Realty Company and to Simon Cohen Real Estate Management Company, and having further ordered that a hearing should be held to determine what portion thereof, if any, should be allocated to the payment of attorneys fees for services rendered to the partnerships and what if any reimbursement should be made to the representative plaintiff for attorneys' fees and expenses paid on behalf of the partnerships, and the Court having notified all parties and the partners of said partnerships of a hearing thereon by notice of hearing dated April 28,



1988, and the Court having held such hearing on May 31, and June 1 and 2, 1988, and Robert Cohen having applied at such hearing for reimbursement of attorneys' fees and disbursements incurred and paid by him in these proceedings, and Stephen Hochhauser having applied at such hearing for attorneys' fees and for reimbursement of disbursements incurred and paid by him in these proceedings, and the Court having rendered its decision dated December 30, 1988, as amended by order dated February 1, 1989, and the Court having received a summary of disbursements incurred and paid by Robert Cohen by letter dated January 13, 1989 from Schoeman, Marsh, Updike & Welt and not having received any objections to said summary,

NOW, THEREFORE, upon motion of Schoeman, Marsh, Updike & Walt,



attorneys for the plaintiff Robert Cohen, it is hereby

ORDERED, that, prior to any distribution of the settlement fund to Simon Cohen Realty Company or to Simon Cohen Real Estate Management Company, Robert Cohen shall be paid from the \$500,000 settlement fund the sum of \$175,000 as reimbursement for reasonable attorneys' fees incurred and paid by him in these proceedings and an additional sum of \$57,114 as reimbursement for proper disbursements incurred and paid by him in these proceedings; and it is further

ORDERED, that, prior to any distribution of the settlement fund to Simon Cohen Realty Company or to Simon Cohen Real Estate Management Company, Stephen Hochhauser shall be paid from the \$500,000 settlement fund the sum of \$10,062 as reimbursement for expert



witness fee disbursements previously incurred by him in these proceedings, and it is further

ORDERED, that, except as otherwise provided herein, the applications of Robert Cohen and Stephen Hochhauser for payment or reimbursement of attorneys' fees and disbursements are denied.

Dated: May 10, 1989

/s/ C. Raymond Radigan  
SURROGATE





STATE OF NEW YORK  
COURT OF APPEALS

-----X

Robert Cohen, Individ-	:	<u>ORDER</u>
ually &c., et al.,	:	
	:	
Estate Co., et al.,	:	
	:	
Appellants,	:	2-13
	:	<u>Mo. No. 841</u>
v.	:	
	:	
Robert J. Reed, et al.,	:	
	:	
Respondents.	:	

-----X

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.



A464

/s/  
Donald M. Sheraw  
Clerk of the Court

[ENTERED October 26, 1989]

FEB 22 1990

IN THE  
**Supreme Court of the United States**

JOSEPH F. SPANIOLO, JR.

OCTOBER TERM, 1989

ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all partners, both general and limited, and in the right and on behalf of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

*Petitioner,*

— against —

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B.F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK — APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF OF RESPONDENTS ROBERT J. REED, SIDNEY HACKELL, FIRST NATIONAL CITY BANK, WILLIAM B.F. WERNER, MID-ISLAND HOSPITAL, DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.

ROBERT W. CORCORAN  
 LYNN, LEDWITH & CORCORAN  
*Attorneys for Respondents*

*Robert J. Reed, Sidney Hackell, First National City Bank, William B.F. Werner, Mid-Island Hospital, Dadgab, Inc., BrimSCO, Inc., Simon Cohen Real Estate & Management Co., Simon Cohen Realty Co. and Aljer Realty Co.*

200 Garden City Plaza  
 Garden City, New York 11530  
 (516) 742-6200

**BEST AVAILABLE COPY**

26



## QUESTIONS PRESENTED

1. Did petitioner preserve in the state court the federal issue of due process here sought to be reviewed?

2. Where a court finds that the representative plaintiff's opposition to settlement of a derivative action brought in the name of the partnership is motivated by personal considerations outside the scope of the action and affords notice and an opportunity to be heard on the settlement to all partners, does due process prohibit the court from approving the settlement over the sole objection of the representative plaintiff?



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---

ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all partners, both general and limited, and in the right and on behalf of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

*Petitioner,*

— against —

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B.F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK — APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

---

BRIEF OF RESPONDENTS ROBERT J. REED, SIDNEY HACKELL, FIRST NATIONAL CITY BANK, WILLIAM B.F. WERNER, MID-ISLAND HOSPITAL, DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.

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## INTRODUCTION

Respondents Robert J. Reed, Sidney Hackell, and Citibank N.A. (formerly First National City Bank), individually and as Executors of the Last Will and Testament of Simon Cohen deceased, William B.F. Werner, individually and doing business as Mid-Island Hospital, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate & Management Co., Simon Cohen Realty Co. and Aljer Realty Co., oppose the petitioner's application for a Writ of Certiorari herein on the following grounds:

1. The petitioner did not, as required by 28 U.S.C. 1257, specifically set up or claim in the state court the right which he now seeks to have this Court enforce. This Court therefore lacks jurisdiction under 28 U.S.C. § 1257.
  
2. Although petitioner does, in his "Statement of the Case" (pp. 7-8 of Petition), indicate the stage in the proceedings below at which the question of "due process" was raised, he has not indicated where in those proceedings any *federal* due process issue was identified, nor has he specified the manner in which any such issue was passed upon by the state court.
  
3. Neither the Surrogate's Court nor the Appellate Division addressed the due process issue petitioner now presents. Hence, even had petitioner adequately raised the issue in the courts below, there would be no reason for this Court to grant the writ to review an implicit decision that can have no influence on other courts.
  
4. Petitioner does not cite a single decision, state or federal, that conflicts with the holding of the Appellate Division that in appropriate circumstances a court may approve the settlement of a derivative or class action without the consent of the representative plaintiff. While, as the Appellate Division unanimously held, the Surrogate's Court was clearly justified in

doing so here, that factbound question does not merit this Court's review.

5. The decree which was rendered in the court of first instance, following some thirteen years of intensive discovery and intermediate litigation, including fifty-five days of trial, accorded to petitioner both substantive and procedural due process. The record of the state action shows no evidence of fundamental unfairness to petitioner.

### STATEMENT OF THE CASE

Petitioner's "Statement of the Case" (pp. 3-11, Petition herein), claiming that he has been deprived of procedural due process is disputed by respondents as inaccurate, unjustified, and unsupported by any record citations.

Simon Cohen died on November 25, 1970, leaving a Last Will and Testament in which he named the defendants herein Reed, Hackell, Citibank and Beatrice Potter (now deceased) as executors of his Last Will and Testament. The decedent left the bulk of his approximately nine million dollar estate to his surviving spouse and two daughters, bequeathing to his son, the petitioner herein, in trust, a single parcel of realty in New Jersey.

In the course of the litigation below, petitioner admitted to the trial surrogate that the decedent stopped talking to him about business affairs approximately two years before his death. The strained relationship between them is demonstrated by a letter which the petitioner wrote to the decedent approximately three months before the latter's death, complaining about his being "dealt out of" his father's affairs. In that letter he stated (SA1-2):\*

---

\* Numbers in parenthesis preceded by "A" refer to the Appendix in this Court. Those preceded by "SA" refer to the Supplemental Appendix in this Court. Those preceded by "RB" refer to the Record in the State Appellate Division. Those preceded by "SRB" refer to the Supplemental Record in said Appellate Court.

"I do hope you will recognize the fallacy of forcing me into a position where I must later perform the unwanted role of having to harass your nominees and delay timely attention to matters on account of information which can so much more easily be transmitted now."

Nine months after his father's death, petitioner commenced this action, accusing his father of multiple acts of fraud and deception against Simon Cohen Realty and Management Company (SCREAM) Simon Cohen Realty Company (SCR) Simon Cohen Company (SCC), and Aljer Realty Co (ALJER). Three years later he amended his complaint, expanding it to seventeen causes of action, and naming additional defendants.

The extent and magnitude of the litigation, during the period from its institution in 1971 to the final decision of the trial court on November 27, 1984, is demonstrated, to a small degree, by the enumeration of the two hundred and fifty eight decisions, orders and decrees rendered and entered in the intervening period (A314-366).

That extended enumeration does not, however, even begin to suggest the additional time, energy and effort expended by the parties and courts in the course of argument of motions, conduct and supervision of depositions, and in the various conferences which were held before different officers of the court below. It does not, for example, reflect that fact: (a) that pretrial examinations utilized by the parties from 1972 through 1978 took place on sixty different days, consumed some five thousand four hundred and seventy one pages of transcript, and saw six hundred and forty seven exhibits marked for identification; (b) that all of the foregoing pretrial examinations took place at the Surrogate's Court in the Nassau County; that on many occasions portions of those examinations were supervised by and subject to the rulings of the Surrogate who is the object of the petitioner's criticism herein, and who was then Chief Law Assistant or Chief Clerk; (c) that on May 22, 1975 the decision of the then Surrogate, the Honorable James Bennett, denying certain motions of the defendants to dismiss the tenth cause of action, followed

the receipt of some three hundred and fifty three pages of testimony at a hearing which was held on February 25th and 26th, 1975; and (d) that the present surrogate, as referee, received the defendants' motion for summary judgment and the voluminous papers which were submitted in support of and in opposition to that motion; that he presided at a hearing on May 15, 1979, which, consuming three hundred and fifty six pages of transcript, explored fully the then known factual and legal matters relevant to that motion; and that after full consideration he submitted an extensive referee's report which was eventually approved by the then surrogate Bennett (RB754-1254).

On March 4, 1980, Trial of the subject action commenced before the Honorable C. Raymond Radigan, as referee to hear and report (SA3-5), and was continued on fifty-five non-consecutive days. It produced a transcript of five thousand five hundred and six pages, and saw the introduction of three hundred and fifty separately numbered exhibits, many of which consisted of multiple documents and pages. On the next to the last day of trial, Steven Hochhauser, then attorney for Petitioner, told the court that he had substantially completed his case. He stated to the Court (SA6-7):

"The only thing remaining, your Honor, is the productions (sic) and few other last other items that don't require witnesses."

When the trial reconvened on October 22, 1981, there was discussion about the production of certain papers and records that had been requested by plaintiff. The presiding Surrogate Radigan stated that the trial had proceeded to a point where both sides had a sufficient basis for assessing their chances, and he would not announce a schedule for resumption of trial or motions until he was advised that settlement was not achievable (SA10).

Settlement negotiations which had begun during the trial were then actively pursued by petitioner and his counsel, the defendants and their counsel, and the guardian *ad litem* in the case,



Morris Rochman. Negotiations resulted in an offer by the defendants which was found, by plaintiff's counsel, to be acceptable and in the best interest of the partnerships, but which was rejected by the plaintiff himself. After the trial was adjourned, plaintiff declined even to consider settlement without first receiving a second opinion from separate counsel with respect thereto. According to Mr. Hochhauser, the petitioners' insistence on such a second opinion was the sole cause of delay in resolving the case, or in resuming the trial (SA10-11).

The record shows that Hochhauser was eventually discharged by petitioner because of his approval of the defendants' settlement proposal. Petitioner moved for removal of Hochhauser as his counsel, and the replacement of him by his present counsel (SA12-14). In response, Hochhauser sought instructions from the Court as to whether or not he should continue to represent the interests of the other limited partners on whose behalf the petitioner had sued derivatively, and asserted that it was his opinion that the proposed offer of settlement "is of enormous value to the partnerships, the family of Simon Cohen, the non-family limited partners and to the Plaintiff himself" (SA17-18). The petitioners objections thereto, according to Hochhauser, were based upon personal considerations rather than the best interests of the parties he represented.

Hochhauser's April 21, 1972 affidavit states, in pertinent part:

"28. I find myself precisely in the posture envisioned by Judge Goldberg in the Pettway case. An offer of settlement has been proposed, which in my opinion, is of enormous value to the partnerships, the family of Simon Cohen, and non-family limited partners and to the plaintiff himself. The plaintiff wants to gamble to obtain more. He has the financial capacity to continue to litigate for another ten years, but the other members of his family and the other limited partners may not be so situated. Indeed, the *more* which he seeks is motivated by personal considerations rather than by a desire to do what is in the best interest of the group he purports to represent." (SA16-18)

It is clear from the foregoing that petitioner's then counsel approved the proposed settlement, and that petitioner sought to avoid the impact of that approval by dismissing him and seeking new counsel who would more readily do petitioner's bidding, thus permitting him to argue that the trial court settlement had neither his approval nor that of his attorney.

In August of 1982 the surrogate determined that the non-party limited partners would be apprised (1) of the status of settlement negotiations and of the defendants' offer; (2) of the pending application for substitution of attorneys; and (3) of the question raised by Hochhauser about whether plaintiff could fairly and adequately represent the interest of the limited partners and the four partnerships (A148). Plaintiff was directed to mail to the partners a notice of hearing to be held on those subjects on October 4, 1982 (A169).

In a Notice of Settlement Offer dated January 13, 1983 (A192), the surrogate carefully reviewed for the limited partners the background of the litigation and directed that his notice, together with a copy of the defendants' offer of settlement be sent to those limited partners. The limited partners were directed to advise the Court in writing, on or before February 16, 1983, of their views, if any, on the proposed settlement (A203).

In a decision dated April 6, 1983 the Court analyzed the responses of the limited partners and noted that a settlement may be imposed on the representative plaintiff if found to be in the best interest of the partnerships (A248-260). The analysis of the responses showed the following: (a) with respect to SCREAM: (1) only 21.5 units, or 10.75 % (including a petitioner) objected to the settlement; (2) 155.5 units, or 82.75 % (including the defendants), approved or did not object to the settlement; (3) ownership of 13 units or 6.5 % was in dispute, and accordingly, those units were deemed neutral for the purpose of the analysis; (b) with respect to SCR: only the plaintiff, who owns 5.4 % of the units, objected; the remaining partners who hold 94.6 % of the units approved the settlement or did not object to it; (c) with respect to SCC and ALJER: (1) three parties responded, two whom accepted unconditionally, and one of

whom accepted, but suggested three changes that were later adopted: (2) no partner other than plaintiff, who holds only 3.3% of the units, objected to the settlement; thus 96.7% approved or did not object.

Having thus analyzed the partners responses to the proposed settlement, the Court directed that a hearing be held on May 24, 1983 to afford to the petitioner and any objecting partners an opportunity to show cause why the proposed settlement should not be approved (A257). A copy of the decision was directed to be mailed to each partner (A259).

At the May 24, 1983 hearing, only the petitioner appeared to oppose the settlement (A291-292). Petitioner submitted an affidavit detailing his objection to the proposed settlement. His opposition was later supplemented by the June 1, 1983 affirmation of his attorney, Michael Schoeman.

On June 22, 1983, the Court stated that it had determined (A265):

"That it would be in the best interest of all of the partners to give the defendants an opportunity to adopt the three [additional] conditions [which had been specified by the some of the partners]."

On April 27, 1984 the Court issued a decision analyzing the settlement proposal in the light of the claims made, appellants likelihood of success, and the best interest of the partnerships (A286-303). The Court concluded that settlement of the action would be in the best interest of the partnership (A300), stating (A293):

"\*\*\*\* The overwhelming majority of the partners who responded favored the settlement and they represented a substantial percentage of the respective partnership interests, far outweighing the interests of the objectors, including the individual interest of the representative plaintiff."

The April 27 decision was the predicate of the Court's November 27, 1984 decree settling and discontinuing with prejudice the derivative claims in the amended complaint.

The petitioner's January 31, 1984 motion for a new trial was denied by the Surrogate on the ground that it had been rendered moot by the decision of April 27, 1984.

In its decision of May 5, 1986, the Appellate Division of the New York State Supreme Court reviewed the proceedings before the Surrogate and, finding them to fully comport with appropriate state procedure, affirmed the Surrogate's actions, stating:

"[W]here it is apparent that no meaningful settlement negotiations are being conducted, due in large part to the representative plaintiff's unwillingness to make certain concessions, and the court receives a settlement proposal it considers to be adequate, the court is not without authority to present the offer to the class of people being represented for their approval or disapproval, provided the notice sent to the class is fair and impartial, and does not indicate the court's views on the proposal. If the responses received from the members of that class are sufficiently favorable, the court may then consider the proposal for its approval, and hold a hearing on the fairness, reasonableness and adequacy of the same. In this case, this procedure was followed." (A-vii - A-viii)

It is submitted that the foregoing summary of the case illustrates clearly that procedures made available to petitioner by the State Court were more than fair and adequate to accord to him due process in all regards.

Although hardly relevant on the present application, plaintiff's use of conclusory and defamatory terms against respondent require some comment, lest silence be taken for acquiescence.

On this application, petitioner (pp 4-5 of Petition) accuses his deceased father of having siphoned off profits from the tenant hospital by awarding to his "cronies" various service contracts, and allegedly reducing the income to the landlord SCREAM; that the hospital was "over charged" on those contracts; and, that the profits therefrom were diverted from the hospital and siphoned off to benefit Simon Cohen. It is significant to note the lack of any citational support for such accusation. The fact is that the record of the fifty-five day trial is devoid of any evidence intending to indicate that the hospital ever paid more than fair market value for the services rendered to it under any of the criticized contracts. The fact is, too, that the decedent, Simon Cohen, was the architect of the entire financial and commercial structure whereby the hospital and the various limited partnerships involved in this action became related, and that there is not one person, including petitioner, who did not acquire his interest in the partnership through and because of his relationship of blood or friendship with the decedent. With lack of proof or evidence to maintain his charges, petitioner has been forced to use, in a derogatory fashion, terms such as "cronies", "diversion", "siphoning". The use of such language, however, does not obscure petitioner's failure, in his long, extensive and debilitating litigation, to show that the hospital or the partnership lost one penny because of the various contracts referred to. Although it is true, as alleged by petitioner, that his father had borrowed money from the various entities named, it was not shown during the trial or the preceding discovery procedures, by testimony or other evidence, that this borrowing was in any way disapproved by any of the various partners of Simon Cohen. It is also significant that in the thirteen years of litigation petitioner received no active support from any of the other partners.

## POINT I

PETITIONER DID NOT PRESENT TO THE STATE COURT, FOR CONSIDERATION OR DETERMINATION, ANY FEDERAL QUESTION, CONSTITUTIONAL OR OTHERWISE, AND THUS HAS NOT DEMONSTRATED ANY BASIS FOR CONCLUDING THAT THIS COURT HAS JURISDICTION TO CONSIDER, ON THIS APPLICATION, HIS FOURTEENTH AMENDMENT CLAIM.

28 U.S.C. 1257, under which petitioner expressly makes the pending application for a Writ of Certiorari, expressly provides, *inter alia*, that the final judgments or decrees rendered by the highest state court in which decision may be had, may be reviewed by this Court by Writ of Certiorari, where "any title, right, privilege or immunity is specially setup or claimed under the Constitution or the treaties or the statutes of \*\*\* the United States." The proper presentation and preservation of the federal claim in the state court has been held to be jurisdictional, and this Court has repeatedly refused to entertain proffered federal questions where the issue was not presented to and decided in the state court. *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981); *Exxon v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296 (1983); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942 (1978); *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106 (1971); *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563 (1970).

Although petitioner does, in his "Statement of the Case" (pp. 7-8 of Petition), indicate the stage in the proceedings below at which the question of "due process" was allegedly raised, he has not indicated where in those proceedings any *federal* due process issue was identified. Nor has he specified the manner in which any such issue was passed upon by the court.

The record herein shows indisputably that no federal question was presented to the state court for resolution. In the Appellate Division, Second Judicial Department, to which petitioner here seeks the issuance of a Writ of Certiorari, his brief



(pp.vii-ix thereof) presented eight specific questions for consideration, all of which challenge the propriety of the discretion which had been exercised by the trial court, and none of which raised any federal issue (SA20-22).

The "Point Headings" utilized by the petitioner to summarize his arguments in that Court were consistent with his formulation of the "Questions Presented", and again did not expressly or impliedly raise a federal question (SA23-24).

In attempting to satisfy this Court's requirement [Rule 21.1(h)] that a petitioner's statement of the case shall specify the stage in the state proceedings at which reviewable federal questions were raised, petitioner here (pp.7-8 of Petition) has specified three such stages:

(a) in connection with his motion to the trial court for a new trial, and specifically in his affidavit in support thereof;

(b) in his appellate division brief, pp 38-41; and

(c) at pages 11 and 12 of his affidavit in support of his fourth application for leave to appeal to the state Court of Appeals.

To the extent that petitioner raised a due process issue in the Surrogate's Court, his own Petition makes clear that he did so only in the context of his motion for a new trial. As the Surrogate held, that motion was rendered moot by the Settlement Decree, and in any event petitioner does not seek review of the disposition of that motion here. Having failed to raise the relevant issue in the Surrogate's Court, he could not properly have raised it in the Appellate Division, and indeed that court addressed no such issue. In any event, petitioner nowhere presented a *federal* constitutional issue to the state courts below and they did not decide any.

a. PETITIONER'S MOTION FOR A NEW TRIAL

Petitioner's motion for a new trial was denied by the trial court, because that motion had been rendered moot by the court's decision settling the action (A304-305). As indicated above, Petitioner did not, in the Appellate Division, refer to any constitutional issue in either his formulation of the questions presented to the court for determination, nor in the summary of his arguments implicit in the "Point Headings" set forth in his brief. While Petitioner did, under Point VII of his Appellate Division Brief, use the words "due process" in arguing that he had been deprived of a "speedy trial" in this civil matter, he did not do so in any federal context; he cited neither the Federal Constitution nor any federal decisions; and he argued the point on the basis of the state practice statute and state cases decided thereunder. Thus, even if petitioner be deemed to have raised a "due process" issue, it was not raised expressly or impliedly as a *federal* question, and could just as readily have been addressed to a possible violation of the Constitution of the State of New York [Article 1, Section 6 (SA29)].

In *Webb v. Webb*, *supra*, 451 U.S. at 493, this Court was faced with a similarly deficient petition in which the petitioner struggled to find language in the state court record to support a claimed federal constitutional issue. There, the words "full faith and credit" were used in the courts below. This Court, in holding that "it is far more likely that petitioner was referring to state law", rejected jurisdiction, stating, among other things (p. 496):

"Although petitioner did use the phrase 'full faith and credit' at several points in the proceeding below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution."\*\*\*

\*\*\*

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court



can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system \*\*\*. Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. \*\*\* We are unpersuaded. In fact, we find it far more likely that petitioner was referring to state law."

Here, a reading of the decision of the Appellate Division of the State Court (A-i) shows no reference to or consideration of any federal statutory or constitutional issue. The absence of any such reference supports our contention that no such issue was considered or decided by that Court. We therefore rely upon the established holding of this Court that when "the highest state court has failed to pass on a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court can affirmatively show the contrary". *Street v. New York*, 394 U.S. 576, 582 (1968); *Bailey v. Anderson*, 326 U.S. 203, 206-207; *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981).

#### **b. PETITIONER'S APPELLATE DIVISION BRIEF.**

Contrary to petitioner's statement (p.7 of his Petition) that he raised at pp.38-41 of his Appellate Division Brief a due process claim, no such issue, either federal or state was there raised. As the matter quoted to this Court by petitioner indicates, his Brief, at the pages cited, was solely concerned with his argument that the trial court had no power, in a derivative action, to impose a settlement without the consent of the representative plaintiff or his counsel. While petitioner did, at a later stage in the argument on this point, allege that such imposition violated his due process rights, the argument was not raised as a federal question, he cited no federal cases dealing with it, and the issue could just as readily been addressed to the State Constitution (Art. I, Section 6). It is submitted that in this claimed instance, as in the matter of petitioner's alleged raising of the

issue of due process with respect to a speedy trial, the presumption should be, as held in *Webb v. Webb, supra*, that reference was to a state constitutional issue.

Lastly, under this point, a reading of the decision and order of the Appellate Division (Ai-xiv) shows no reference to, consideration or decision of any due process question, thus calling for the assumption that the omission was due to a want of proper presentation. *Street v. New York, supra*; *Bailey v. Anderson, supra*; *Webb v. Webb, supra*.

**c. PETITIONER'S FOURTH APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

Pages 11-12 of the Schoeman Affidavit (SA26-29), submitted by petitioner in support of his motion seeking leave to appeal from the Appellate Division Order to the state Court of Appeals, did not present any federal question for consideration and determination. In paragraphs "30" and "31" of that affidavit, Mr. Schoeman argued that the Appellate Division "erroneously" relied upon the trial court's solicitation of "consent" of the limited partners to the proposed settlement. He terms "this entirely new procedure" both unwise and a violation of petitioner's "due process" rights, alleging that the principle does not permit the imposing on him, as a sole representative plaintiff, of a settlement that he has not agreed to, and, alleging further, that such procedure deprives him of the right to a fair hearing.

Again here, as in "(a)" and "(b)" above, Mr. Schoeman's affidavit raised no federal issue for consideration, either expressly or by clear implication. Procedural due process was not lacking. On the contrary, the state afforded petitioner almost thirteen years to prove his case, with fifty-five days of actual trial. Having afforded petitioner all that time and opportunity to make his case, the trial court, after reviewing the history of the litigation, and after finding that the "overwhelming majority of he partners who responded favored the settlement" (A293), stated its opinion "that this settlement is in the best interest of the partners \*\*\*\*" (A300).

If perchance there was any possibility of a "due process" issue involved in the trial courts action, it clearly was not raised as a federal question by any of the allegations relied upon by Mr. Schoeman in his affidavit. Moreover, the denial of petitioner's motion for leave to appeal without any reference to the due process question raises the presumption that the issue had not been properly presented. *Street v. New York, supra*; *Bailey v. Anderson, supra*; *Webb v. Webb, supra*.

## POINT II

### PETITIONER PROVIDES NO REASON FOR THIS COURT TO REVIEW THE DECISION BELOW.

Even were this Court to determine that it had jurisdiction, petitioner provides no reason to grant the writ. Indeed, petitioner does not cite a single decision, state or federal, that conflicts with the holding of the Appellate Division that in appropriate circumstances a court may approve the settlement of a derivative or class action without the consent of the representative plaintiff. The Appellate Division's unanimous conclusion that the Surrogate's Court was clearly justified in doing so here is a factbound question not meriting review by this Court.

In any event, the Appellate Division's decision, while not mentioning due process, nonetheless makes plain that due process principles were more than adequately safeguarded here.

If it be assumed, for the purpose of argument only, and with no intention to concede the point, that the petitioner on his present application has raised a federal question of deprivation of due process under the Fourteenth Amendment, he has done so only with respect to procedural due process.

Petitioner, as limited by his petition herein, challenges only the constitutional impropriety of the procedure whereby the state trial court terminated the trial after fifty-five (55) days spent on plaintiff's main case, refused to order a new trial, and directed settlement of the action on specified terms. The dimension of

the due process issue is measured both by petitioner's formulation of the "Questions Presented" in the Appellate Division (SA23-24) and by his "Statement of the Case" (pp. 3-8 of Petition). That formulation and statement show that petitioner complains only because of the alleged novelty of the procedure adopted by the trial judge in disposing of the thirteen (13) year litigation (pp. 7-8 of Petition). Examination of petitioner's brief in the Appellate Division of the State Court, to which he refers this Court (pp. 7 of Petition), shows that he there predicated his due process assertion on counsel's claimed lack of knowledge of any prior case where a class or derivative action was settled without the "actual agreement" of a representative plaintiff or his counsel. In counsel's affidavit, submitted in support of the petitioner's application to the State Court of Appeals for leave to appeal (to which petitioner refers this Court at p. 8 of the petition herein), he complained of the "unwise" reliance upon the Court-solicited "consent" of the limited partners, and complained that "this entirely new procedure violates the due process rights of the representative plaintiff."

It is submitted that petitioner has demonstrated no deprivation of procedural due process. Initially, it should be noted that he acted here as a representative plaintiff in a derivative action, seeking to enforce not his personal rights, but those of the limited partnerships. §115A of New York's Partnership Law (SA30-32), a companion to §626 of New York's Business Corporation Law, statutorily creates a derivative action where none existed at common law, and provides for control thereof by the court. The action is equitable in nature, and any relief granted must be in favor not of the representative plaintiff, but in favor of the beneficiaries thereof. *Papilsky v. Berndt*, 333 Fed. Sup. 1084, Aff. 466 Fed. 2d 251, Cert. Denied 409 U.S. 1077, 93 S. Ct. 689 (1971); *Abrahamowitz v. Posner*, 672 Fed. 2d 1025 (1982); *Richland v. Crandall*, 259 Fed. Sup. 274 (1966); *Riveria Congress Associates v. Yassky*, 268 N.Y.S. 2d 854, 25 App. Div. 291, Aff. 277 N.Y.S. 2d 389, 18 N.Y. 2d 540 (1966).

In asserting that only he, as the plaintiff, was entitled to settle the action, the petitioner here refuses to acknowledge the

fiduciary nature of his position. He also chooses to ignore the history of derivative actions, which show many examples of judicial decisions expressly recognizing the right of the judiciary to control the course of such litigation, and to require settlement against the approval of the named plaintiff. *Saylor v. Lindley*, 456 Fed. 2d 896 (2nd Circuit, 1972); *Denicke v. Anglo California Bank*, 141 Fed. 2d 285 (9th Circuit 1944), Cert. denied, 323 U.S. 739; *Bysheim v. Meranda*, 44 N.Y.S. 2d 15 (Supreme Court, New York County, 1943); *Beeber v. Empire Power Corp.*, 31 N.Y.S. 2d 914 (Supreme Court, New York County, 1941).

As Judge Friendly, speaking for the Second Circuit Court said in *Saylor v. Lindley*, *supra* (at pp. 899-900):

"We are willing to go along with appellees and hold, despite the seeming incongruity, that the assent of the plaintiff (or plaintiffs) who brought a derivative stockholders action is not essential to a settlement; a contrary view would put too much power in a wishful thinker or a spitemonger to thwart a result that is in the best interest of the corporation and its stockholders." (Footnote omitted)

Similarly, in the *Bysheim* case, *supra*, a New York trial court, approving the settlement of a derivative action over the objection of one of the plaintiffs, stated (p. 22):

"[A derivative plaintiff's position as such] cannot set him up as a dictator with power to compel a continuance of the action against the unanimous consent of a disinterested Board of Directors of the Corporation, his six co-plaintiffs, and substantially all of the other stockholders \*\*\*. That position certainly cannot oust the court of its jurisdiction to pass upon and approve a fair and non-collusive compromise and to terminate a protracted and expensive litigation. And his consent as a stockholder to that kind of a compromise is no more essential to the court's power to approve than his consent as a plaintiff."

Significantly, the power of the courts to settle representative actions without the approval of the plaintiffs has been recognized, as well, in class action cases. *Flinn v. F.M.C. Corp.*, 528 Fed. 2d 1169 (4th Circuit, 1975); *Purcell v. Keane*, 54 F.R.D. 455 (E.D. Pa. 1972); *Pettway v. American Cast Iron Pipe Co.*, 576 Fed. 2d 1157 (5th Circuit, 1978); *Officers for Justice v. Civil Service Commission*, 688 Fed. 2d 615 (9th Circuit, 1982).

It is respondent's position on this application, that the procedure utilized by the trial court was reasonable and judicious under all of the circumstances of the case, and that the propriety of that procedure has been affirmed by the Appellate Court, whose decision and order the state's highest court has refused to review. The petitioner's argument that the trial court had no power to settle this action has already been answered by the state appellate process which has been exhausted herein.

Petitioner's obvious dislike of the state procedure provided by Section 115-A of the Partnership Law does not establish a "due process" violation. There is nothing in the procedure used by the state courts which "so shocks the conscience" as to establish a constitutional violation. The state not only provided the judicial vehicle for assertion of the partnerships' rights, but provided for an extensive discovery procedure which was utilized by plaintiff for over nine (9) years, and permitted the plaintiff some fifty-five (55) days to prove his direct case. As respondent's "statement of the case" shows, not only did the trial court conclude that the defendants offer of settlement was fair and adequate, but Steven Hochhauser, who had represented the petitioner for approximately ten (10) years, concluded that the petitioner's personal interest prevented him from adequately representing his wards, and recommended settlement on the defendant's terms.

Petitioner's disagreement with the procedure followed and approved by the state courts would seem to be irrelevant. As this Court said in *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408 (1957):

"\*\*\* Furthermore, due process is not measured by the yardstick of personal reaction or spychmogram of



the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process.\*\*\*"

It is submitted that the record in this case demonstrates clearly that the community sense of "decency and fairness" has been adequately satisfied by the state courts, and that petitioner's due process claim is unfounded.

## CONCLUSION

The petitioner's application of a Writ of Certiorari to the Appellate Division of the New York State Supreme Court should be denied.

Dated: Garden City, New York  
February 22, 1990

Respectfully submitted,

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FEB 23 1990

JOSEPH F. SPANIOL, J.  
CLERK

In The  
Supreme Court of the  
United States

October Term, 1989

ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all other partners, both general and limited, and in the right and on behalf SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

*Petitioners,*

-against-

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B. F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAR, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

*Respondents.*

*On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.*

BRIEF OF RESPONDENTS JUAN SOTO, ELAINE WILSCHEK, J. S. K. CLEANING SERVICES, INC., SHELDON KATZ and VOLUME FEEDING, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Inc., Sheldon Katz and Volume Feeding, Inc.*

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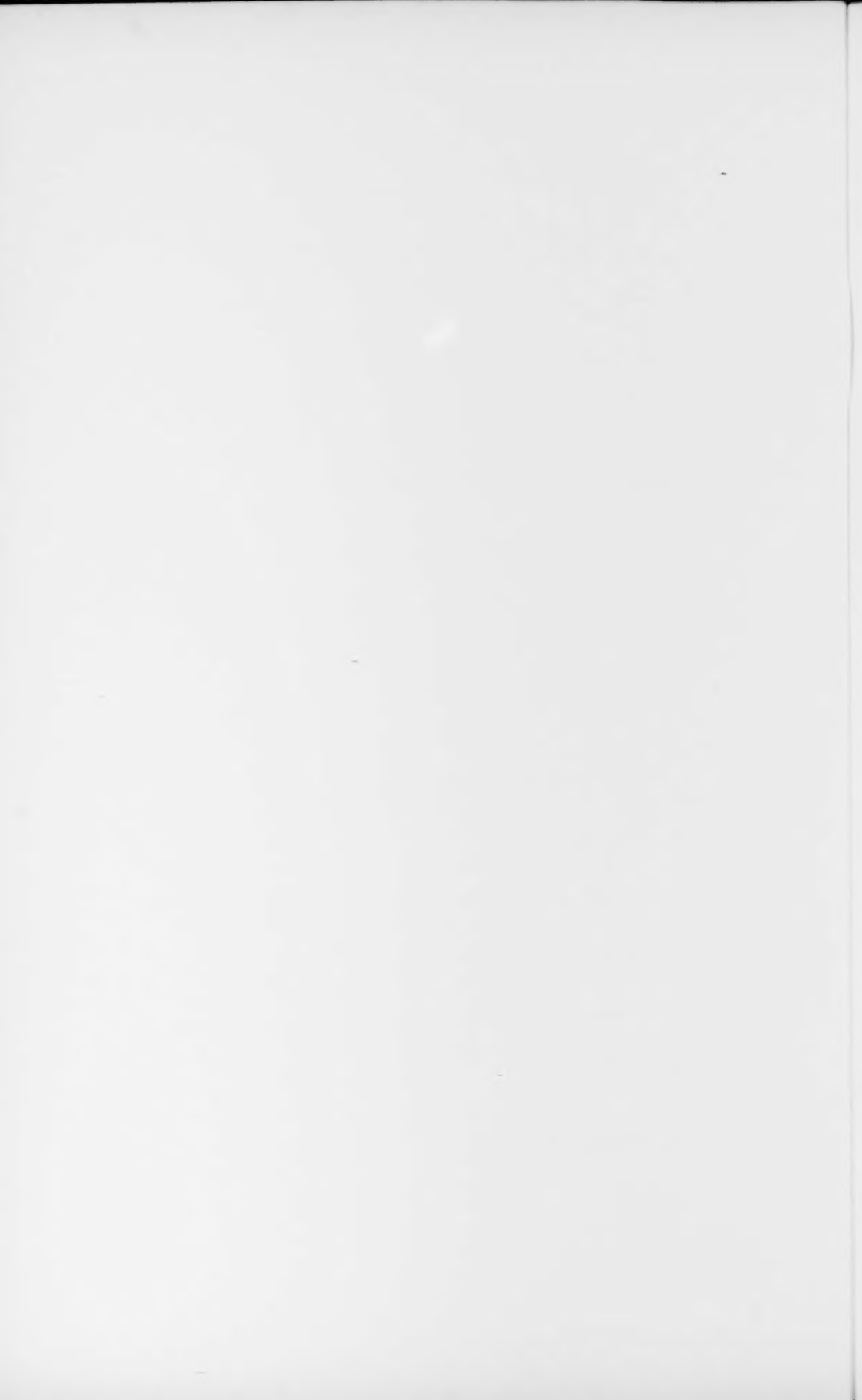
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No. 89-1245

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In The  
Supreme Court of the  
United States

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October Term, 1989

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ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all other partners, both general and limited, and in the right and on behalf SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

*Petitioners,*

-against-

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B. F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAR, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

*Respondents.*

---

*On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.*

---

BRIEF OF RESPONDENTS JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., SHELDON KATZ and VOLUME FEEDING, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Juan Soto, Elaine Wilschek, J. S. K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding,

Inc.,\* respectfully submit this Brief in Opposition to the Petition of Robert Cohen for a Writ of Certiorari to ~~The~~ Supreme Court of the State of New York, Appellate Division, Second Judicial Department. Respondents urge that Petitioner has not invoked any right protected by the Constitution of the United States, nor does his Petition raise an issue of such conflict or of such inherent importance as to require resolution by this Court.

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\* Disclosure Statement Pursuant to Rule 29.1: There are no parent companies of J.S.K. Cleaning Services, Inc. and Volume Feeding, Inc., or any subsidiaries not wholly owned by these corporate respondents.

## COUNTERSTATEMENT OF THE CASE

This litigation was commenced by Robert Cohen, the only child of the late Simon Cohen, in 1971. In it, Mr. Cohen, purporting to act individually and as representative of various partnerships and corporations created by his father, sued his father's Estate and various other parties including these Respondents for moneys which he alleged were diverted by his father from the profits of Mid Island Hospital, a proprietary hospital located in Plainview, New York. One of the partnerships, Simon Cohen Real Estate & Management Co., known under the acronym, "SCREAM", held the rights to the real estate on which the hospital was erected and was entitled, as part of its rent, to a portion of the profits of the hospital. While the hospital was owned by Respondent William B. F. Werner, M.D., Simon Cohen was the managing director of the hospital and had admitted influence in its financial affairs.

As a management technique, Simon Cohen followed the accepted and often recommended practice of contracting out to vendors those services which the hospital did not have to perform itself. Where appropriate, he assisted existing personnel in organizing business entities that could compete for hospital business. Thus, Respondent Volume Feeding was organized under Respondent Katz to take over the dietary operations of the hospital and Respondent J. S. K. Cleaning Services was organized under Respondents Soto and Wilschek to furnish housekeeping services to the hospital. It was not the first time the hospital had used outside cleaning services and the hospital was far from J.S.K.'s only account. Simon Cohen's stated reason

for dealing with such independent entities and even assisting their organization was to compartmentalize the operations of the hospital, to free hospital management from the array of labor/management issues that each specialty engendered, and to give the hospital flexibility in management decisions. As noted, Petitioner Robert Cohen argued below that the true but unstated reason Mr. Cohen fostered this method of operation was to shrink the profits of the hospital and thereby reduce the rents payable to himself, to Petitioner and the other partners of SCREAM. In fact Petitioner argued, Simon Cohen then secretly made arrangements to get the money back from these parties for his own account and purposes.

The merits of Petitioner's case are largely irrelevant to the issues before this Court. The case was settled. It is not the merits of that settlement that Petitioner argues to the Court, at least directly, but the method by which it was settled that is at the core of Petitioner's presentation to this Court.

The sequence of events leading to the settlement are not in serious dispute and are set forth in the Opinion of the Appellate Division of May 5, 1986 (Reproduced at Ai - Axi), and the opinions of the trial court dated April 6, 1983, June 22, 1983, April 27, 1984 (reproduced at A248, A261 and A286, respectively). The case was on trial in Spring of 1981 when, under the guidance of the trial court, settlement discussions were begun. Various settlement proposals were made by the defendants and Petitioner made his responses. While these discussions were not "of Record," that they had taken place was clearly brought out in March of 1982 when Petitioner's then

attorney, Stephen Hochhauser prompted by Petitioner's effort to replace him, filed papers with the trial court informing the court of Petitioner's intransigence on the matter of informal resolution, of Mr. Hochhauser's opinion that Petitioner was acting for motives other than the best interests of those he represented, suggesting that Petitioner be removed as such representative and, in any event, asking for further instructions on what he, Hochhauser, should do under the circumstances. In decision dated August 2, 1982 (A138) the trial court directed the Petitioner to give notice to the other partners of the organizations he was purporting to represent informing them of the proposals that had been made and advising them of a right to be heard on any of these matters. The Notice was mailed, but Petitioner elected to include his own, unauthorized, position paper with the mailing. Ultimately, Petitioner was not removed as representative and Mr. Hochhauser was relieved of a representation that had placed him in conflict. On January 18, 1983, the trial court directed a further Notice be distributed to all of the involved parties (without the benefit of Petitioner's inserts) including the current state of settlement proposals and soliciting a response by February 16, 1983 (A205). Responses were received which were overwhelmingly favorable and the trial court, after making some adjustments indicated in the comments, approved the settlement in the Order herein complained of.

The settlement affected only that part of the action in which Petitioner sought to act as a representative. It left him free to pursue independently whatever remedies were available to him as an individual. Petitioner chose not to pursue his

personal rights and voluntarily discontinued his individual action (A405).

The New York Court of Appeals, the State's highest court, declined to exercise discretionary review of the case (A463).

This is respectfully submitted that on the facts presented there is no occasion for intervention by this Court.

## THE PETITION SHOULD BE DENIED

### POINT I

#### NO FEDERAL ISSUE IS PRESENTED BY THIS CASE

Petitioner urges that, "review is needed to prevent a miscarriage of justice." (Br. P. 11). It is axiomatic, however, that this Court does not sit to right all perceived wrongs. Its jurisdiction in certiorari is limited by statute and by sound principles of federalism to situations "where any title, right, privilege, or immunity is . . . claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257.

At the threshold of a determination of whether such right, privilege or immunity exists is the preliminary question of whether such right, privilege or immunity was claimed before the state court and passed on by it. Petitioner quotes two brief excerpts from his briefs to the appellate division to establish that the constitutional issue was before the state court. The references are ambiguous, unspecific and far from the kind of argument that would call for a response from the state court. A mere casual reference in a brief to possible federal claims does not raise the constitutional issue. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L.Ed2d 474, 107 S.Ct. 1940 (1987); *Webb v. Webb*, 451 U.S. 493, 68 L.Ed2d 392, 101 S.Ct. 1889 (1981). Moreover, the decision of the appellate division is utterly silent concerning any constitutional issue. Failure by a state court to even mention

the federal issue gives rise to the presumption that the federal question was not considered by the state court. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 76 L.Ed 2d 497, 103 S.Ct 2296 (1983) *Fuller v. Oregon*, 417 U.S. 40, 40 L. Ed2d 642, 94 S.Ct. 2116 (1974); *Street v. New York*, 394 U.S. 576, 22 L. Ed2d 572, 89 S.Ct. 1354 (1968).

Even assuming, *arguendo*, that a proper federal issue was raised before the state court, this Court nonetheless declines review where the decision below can be justified on independent state grounds. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252 (1950). Here, as emphasized by Petitioner, his standing to commence any action as representative and on behalf of the various limited partnerships was a creature of the New York statute. It was for New York alone to determine the operation and effect of that statute and the scope of the rights and obligations created thereby. The decision of the appellate division interpreted the statute and defined those rights. The decision is wholly supportable on those grounds alone. The alleged federal question is immaterial.

Petitioner cites no case entitling him, as a matter of federal law, to act as a fiduciary for these partnerships. Turning to the narrower issue presented by this case, he has also failed to cite any statute or decision that, as a matter of federal law entitled him, even as such fiduciary, to exercise total, unsupervised and unlimited right to control all aspects of the litigation. It is doubtful such a case could be found because even if a fiduciary elects to minimize his obligations to his *cestuis que trustent*, the court, even more than he, is charged



with overseeing that those rights are properly respected. It cannot stand idly by while obligations are sacrificed to personal objectives and it would be a remarkable holding indeed that required a state court, as a matter of federal law, to refrain from exercising supervision over fiduciarys before it.

Petitioner urges that it was inconsistent for the state court to decline to remove him as representative of the partnerships, on the one hand, and then restrict him in the scope of his discretion over the case and to go, in effect, over his head on the question of settlement. That hardly seems a federal issue, but it must further be asked what required the state court to assume an all-or-nothing approach to the matter? Was it obliged to keep Mr. Cohen and all his works or risk having a representative litigation that had been pending before it for almost 15 years become leaderless and even more difficult to resolve? The record is barren of any volunteers to assume Mr. Cohen's position.

Petitioner is incorrect when he urges that the actions of the New York courts were unprecedented. Numerous cases have gone to settlement over the objection of the representative plaintiff. *See, e. g., Flynn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 47 L.Ed2d 734, 96 S.Ct. 1462 (1976); *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182 (N.D. Ill. 1981); *Armstrong v. Board of School Directors*, 471 F.Supp. 800 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980); *Purcell v. Keane*, 54 F.R.D. 455 (S.D.N.Y. 1972). That Petitioner elected to dismiss counsel who disagreed with him on

settlement terms does not vitiate the conversations that had, in fact, taken place.

Petitioner seeks to distinguish these cases on the ground that the class members had the right to "opt out" of the settlements. What Petitioner omits is that the decision of the trial court left him, too, free to pursue his personal remedies. He, for tactical reasons, elected to discontinue his personal suit.

Petitioner has presented no discernable right, privilege or immunity protected by federal law. Whether such rights as he alleges were presented to and passed upon by the state court is far from established. In any event, there are independent state grounds supporting the decision below.

## POINT II

### NO ISSUES OF PUBLIC IMPORTANCE ARE PRESENTED ON THIS PETITION

Even if a federal question were presented on this Petition, Petitioner has done nothing to satisfy the further requirements for certiorari under Rule 17.

In view of the precedents created under Federal Rule of Civil Procedure 23, cited above, the so-called federal issue in this case, even accepted as a federal question, seems almost frivolous.

"Importance" means something more than an interesting academic question, or even a matter of substantial importance to the parties. It must be a matter of public concern that calls for this Court's resolution. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). Nothing has been shown demonstrating the slightest public importance of the issues at bar. For that reason alone the Petition should be denied.

Petitioner argues, however, that this Court should consider his case because the Court has never directly addressed the question of the power of a court in a derivative action to impose a settlement in the absence of an agreement among the litigants. (Br. P. 11) That may be so, but it is a factor that militates against, not in favor of, certiorari. Under established principles, the Supreme Court (or any other federal court)

should not make constitutional formulations unnecessarily. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, *supra*; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 80 L.Ed. 688, 56 S.Ct. 466 (1936). Nothing in the presentation to this Court makes such a pronouncement necessary.

## CONCLUSION

For the reasons stated, the Petition of Robert Cohen for Writ of Certiorari should, in all respects, be denied.

Dated: February 23, 1990

Respectfully submitted,

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